SELECTED GUIDELINE APPLICATION DECISIONS FOR THE NINTH CIRCUIT

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Table of Contents

Page

Page

Page

Table of Authorities

Page

Page

Page

Page

Page

Page

U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS—NINTH CIRCUIT

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Jackson, 167 F.3d 1280 (9th Cir. 1999). The jury returned a general verdict finding the defendant guilty of conspiracy, acquiring prescription drugs by fraud, and furnishing false prescription information, but acquitting the defendant of distribution of prescription drugs and possession with intent to distribute. The government appealed the district court's failure to apply §1B1.2(d) which requires a conviction on a single count of conspiracy to commit more than one offense to be treated as if the defendant had been convicted of a separate count of conspiracy for each offense the defendant conspired to commit. The appellate court agreed with the government, rejecting the defendant's Fifth Amendment and the Sixth Amendment challenges to §1B1.2(d). The court then held that the facts before the district court, regardless of whether one relied on the evidence supporting the substantive distribution charges of which she had been acquitted or on the evidence of uncharged conduct, supported a finding that Jackson was guilty of conspiring to distribute prescription drugs. The district court's failure to apply §1B1.2(d) and sentence Jackson accordingly was error, and the case was remanded for resentencing.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Ortiz, 362 F.3d 1274 (9th Cir. 2004). The Ninth Circuit clarified the proper standard for determining relevant conduct for jointly undertaken criminal activity under §1B1.3(a)(1)(B) as amended in 1992. The court held that for sentencings governed by the revised guidelines which became effective November 1, 1992, district courts must make two findings in order to attribute the conduct of others to a defendant under §1B1.3(a)(1)(B): that the conduct was in furtherance of jointly undertaken criminal activity, and that it was reasonably foreseeable in connection with that activity. The Ninth Circuit concluded that the relevant conduct guideline for jointly undertaken criminal activity is to operate conjunctively. Having clarified that the standard for applying the revised §1B1.3 is conjunctive, the court then considered whether the district court correctly determined that the defendant was accountable for the coconspirator's deliveries and concluded that it did.

United States v. Palafox-Mazon, 198 F.3d 1182 (9th Cir. 2000). The district court did not err when it sentenced each defendant based on the quantity of drugs attributable to him instead of the entire quantity involved in the offense.

United States v. Gamez-Orduno, 235 F.3d 453 (9th Cir. 2000). The district court erred by summarily adopting the amount of drugs attributed to the defendant by the PSR without first determining the amount that the defendant could reasonably foresee would be involved in the jointly undertaken criminal activity.

United States v. Hoskins, 282 F.3d 772 (9th Cir. 2002). The defendant challenged a two-level enhancement, per §2B3.1(b)(4)(B), for physically restraining someone to facilitate the robbery of a K-Mart. The defendant claimed that he did not actually physically restrain the subject attendant. USSG §1B1.3(a)(1)(B) instructs that the reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal activity should be considered when imposing enhancements. Because the criminal plan involved taking over the K-Mart cash room and because it was likely that an employee would be working in or near the cash room, it was not clearly erroneous for the district court to conclude that the restraint was foreseeable.

United States v. Parker, 241 F.3d 1114 (9th Cir. 2001). The district court properly increased defendant's sentence for physical restraint of a victim based on relevant conduct.

United States v. Shaw, 91 F.3d 86 (9th Cir. 1996). The district court properly held a defendant not present during the planning of a robbery accountable for a co-conspirator's physical restraint of a victim during a bank robbery.

United States v. Ochoa, 311 F.3d 1133 (9th Cir. 2002). The defendant pled guilty to distributing 3 kilograms of cocaine in violation of section 841(a)(1), which carries a maximum penalty of 40 years in prison. The defendant also stipulated to the fact that he participated in the distribution of an additional 36 kilograms of cocaine. Applying section 1B1.3, the district court considered the additional 36 kilograms when computing the base offense level and the sentence was affirmed. On appeal, the defendant argued that *Apprendi* renders section 1B1.3 unconstitutional because it allows courts to impose a sentence based on drug quantity neither charged in the accusatory pleading, nor proven beyond a reasonable doubt. Pursuant to §5G1.1(c), any application of §1B1.3 may not exceed the statutory maximum for the underlying offense of conviction. The Ninth Circuit held that it was unnecessary to submit the amount of drugs to a jury because the sentence did not exceed the statutory maximum. The court noted that defendant's 87-month sentence was substantially less than the 40-year statutory maximum for his offense of conviction, therefore, *Apprendi* was not implicated in his case.

United States v. Munoz, 233 F.3d 1117 (9th Cir. 2000). The defendants had been charged and convicted of two fraudulent sales of phony investments. At sentencing, the defendants did not dispute that they and their company made many more sales, but they argued that they only knew the sales were fraudulent during the time they made the sales of which they were convicted. If they were held responsible for only the two sales, a five-level upward adjustment applied, and their resulting sentencing range was 12-18 months; if held responsible for all the sales, a 14-level adjustment would apply, and a 41-51 month range would result. The Ninth Circuit held that the difference in sentencing exposure was sufficiently disproportionate to require the government to

prove by clear and convincing evidence that the defendants knowingly and intentionally engaged in all the uncharged conduct.

United States v. Hopper, 177 F.3d 824 (9th Cir. 1999). Where consideration of certain violent conduct of which the defendant was acquitted would have increased the defendant's exposure from 30 to 48 months, the district court should have applied a clear and convincing standard.

United States v. Hicks, 217 F.3d 1038 (9th Cir. 2000). A jury convicted the defendant of making false statements to a federally insured financial institution after he defaulted on a loan approved based on a false tax return and application. At sentencing, the defendant argued that after his offense, the bank had participated in criminal misconduct, which resulted in sales of some of the secured properties at unreasonably low prices, and that he should not be held accountable for the subsequent inflated loss. The district court rejected the argument. Section 1B1.3(a)(3) allows consideration in a loss calculation of "all harm that *resulted from* the acts or omissions" of the defendant (emphasis added). Because "[n]ew losses inflicted independently by third-party criminals after the completion and discovery of a defendant's crime do not 'result from' that crime for purposes of the Sentencing guidelines," the court held that "[f]or purposes of computing a fraud defendant's adjusted offense level under §2F1.1, losses caused by the intervening, independent, and unforeseeable criminal misconduct of a third party do not 'result[] from' the defendant's crime and may not be considered." The court remanded the case for the district court to make findings regarding the defendant's argument.

§1B1.9 Class B or Class C Misdemeanors and Infractions

United States v. Mack, 200 F.3d 653 (9th Cir. 2000).[1] The jury convicted the defendants of unlawfully maintaining a structure and impeding a United States Forest Service road, after the defendants refused to remove the chains with which they had attached themselves to construction equipment in protest of the road building and logging in the community. The district court did not err when it sentenced defendants to harsher sentences than those imposed on their codefendant, who had pled guilty. The defendants challenged their sentences, arguing that the relative severity of their sentences indicated that the district court had penalized them for proceeding to trial. The circuit court affirmed the sentences, holding that the district court's explanation that the defendants expressly refused to abide by any restitution order sufficiently justified the imposition of heavier sentences.

[1]The defendants also argued that the "district court violated their right to allocution under 18 U.S.C. § 3553(a)(1) by precluding them from articulating their beliefs and motives about the environment and the law" when it interrupted their allocutions and asked them "to speak to the issues of mitigation." *Id*. at 657. The court rejected this argument, finding that because the district court did not intimidate or deter the defendants from speaking, merely requesting that they speak about the relevant issues, it did not deny the defendants the right of allocution.

§1B1.11 Use of Guideline Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Bernard, 48 F.3d 427 (9th Cir. 1995). The defendant challenged the district court's imposition of a sentence to run consecutive to the sentence the defendant was already serving for violating his supervised release. The circuit court ruled that Application Note 4 "merely makes explicit what was otherwise implicit in the operation of §5G1.3(b) and 5G1.3(c)" which is that the sentence for any offense committed while on supervised release is to be served consecutive to the sentence for the supervised release violation in order to "achieve reasonable incremental punishment." The circuit court held that Application Note 4 confirms a sound prior interpretation of section 5G1.3, and the district court did not violate the *ex post facto* clause when it relied on Application Note 4 to interpret §5G1.3.

United States v. Chea, 231 F.3d 531 (9th Cir. 2000). Subsequent version of the sentencing guidelines applicable to the defendant subject to undischarged terms of imprisonment altered the sentencing process to the defendant's disadvantage and could not be applied to a defendant who committed the offense while the old guideline was in effect.

United States v. Guzman-Bruno, 27 F.3d 420 (9th Cir. 1994). The defendant was convicted of being a deported alien found in the United States in violation of 8 U.S.C. § 1326. The district court sentenced him using the1992 Sentencing Guidelines Manual. The defendant argued that the sentencing judge should have used the 1990 version of the guidelines because the 1992 version imposes harsher penalties, and he committed his offense in 1990 when he reentered the United States after being deported and reported to his state parole officer under a different name. The circuit court held that the district court did not commit any *ex post facto* violation because a violation of 8 U.S.C. § 1326 is a continuing offense which continued until the defendant's arrest in 1992.

United States v. Merino, 44 F.3d 749 (9th Cir. 1994). UFAP is a continuing offense and thus subject to the guidelines in effect at sentencing if any portion of the offense occurred after the guidelines' effective date.

Hamilton v. United States, 67 F.3d 761 (9th Cir. 1995). The district court violated the *ex post facto* clause in sentencing the defendant under the 1993 guidelines in effect at the time of resentencing. The defendant was originally sentenced under the 1988 guidelines as a career offender after pleading guilty to being a felon in possession of a firearm. In 1993, the defendant appealed his sentence based on Amendment 433, which provides that "the term `crime of violence' does not include the offense of unlawful possession of a firearm by a felon." The circuit court noted its previous holding in *United States v. Garcia-Cruz*, 40 F.3d 986, 990 (9th Cir. 1994), that "where the application of the amended guidelines results in a harsher sentence, the sentencing court is to apply the guidelines in effect at the time of the offense, but also must consider the clarification provided by Amendment 433." The court ruled that the defendant was entitled to be sentenced by the guidelines in effect at the time of the offense as they are affected by the retroactive application of Amendment 433.

United States v. Canon, 66 F.3d 1073 (9th Cir. 1995). Absent an *ex post facto* problem, the court must apply the version of the sentencing guidelines in effect on the date of resentencing.

United States v. Sanders, 67 F.3d 855 (9th Cir. 1995). The Ninth Circuit reversed the district court's imposition of consecutive terms of supervised release. The defendant was originally sentenced to two consecutive terms of supervised release after pleading guilty to bank robbery and using a firearm during a crime of violence. Although at the time of the defendant's sentencing, Ninth Circuit precedent allowed consecutive terms of supervised release, a 1994 amendment to the sentencing guidelines "made clear that supervised release terms are not to run consecutively, even in cases where punishments for the underlying crimes must be imposed consecutively." The Ninth Circuit held that the amendment retroactively applied to the defendant's sentence, and remanded the case to the district court for resentencing.

§1B1.12 Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)

United States v. Doe, 53 F.3d 1081 (9th Cir. 1995). The Ninth Circuit held that the sentencing guidelines do not apply to a defendant sentenced under the provisions of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 and an adjudicated juvenile delinquent may not be sentenced to a term of supervised release.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A2.2 Aggravated Assault[2]

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994), *rev'd on other grounds*, 73 F.3d 229 (1995). The district court applied the dangerous weapon enhancement to the defendant's sentence for aggravated assault resulting in serious bodily injury and involuntary manslaughter where the defendant had caused an automobile accident while he was intoxicated. The circuit court reversed, reasoning that an upward adjustment under §2A2.2(b)(2)(B) is authorized only when a defendant used an instrument capable of causing serious bodily injury with the intent to injure his victim. Because the circuit court concluded the defendant's conduct was reckless, but not intentional, he did not "use" a dangerous weapon within the meaning of the guidelines. Note: Amendment 614 expressly identifies a car as (potentially) a dangerous weapon.

[2] An amendment effective November 1, 2004, added an enhancement to §2A2.2 (Aggravated Assault) if the defendant was convicted under 18 U.S.C. § 111(b) or § 115; decreased the base offense level by one level; and increased by one level each of the specific offense characteristics for degrees of bodily injury.

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse[3]

United States v. Michaud, 268 F.3d 728 (9th Cir. 2001). Because the cross-reference resulted in a higher offense level, pursuant to §2A4.1(b)(7)(A), the district court cross-referenced §2A3.1, based upon aggravated sexual abuse by force or threat, to determine the base offense level. The defendant contended that because §2A4.1(b)(5) contains a separate provision for kidnaping involving sexual exploitation of the victim, a cross reference to §2A3.1 rendered §2A4.1(b)(5) superfluous. Because §2A4.1(b)(7)(A) unambiguously states that the offense level from the other offense committed during a kidnaping is to apply if it results in a greater offense level, the district court did not err in its application of the guidelines.

§2A4.1 Kidnapping, Abduction, Unlawful Restraint[4]

See United States v. Michaud, 268 F.3d 728 (9th Cir. 2001), §2A3.1.

United States v. Sierra-Velasquez, 310 F.3d 1217 (9th Cir. 2002), *cert. denied*, 538 U.S. 952 (2003). The defendants agreed to take a group of aliens from Mexico into the United States for a fee; the defendants then brutally detained the aliens against their will while demanding that the fee be paid. The district court refused to apply the ransom enhancement, finding that there could be no ransom within the meaning of the guideline unless the price was demanded that was higher than the agree-upon fee. The Ninth Circuit disagreed with the district court's reasoning. The court joined sister circuits which have held a ransom enhancement under §2A4.1(b)(1) applies anytime a defendant demands money from a third party for the release of a victim, regardless of whether that money was already owed to the defendant.

§2A6.1 Threatening or Harassing Communications

United States v. Alexander, 287 F.3d 811 (9th Cir. 2002). The defendant argued that the district court improperly applied a two-level enhancement pursuant to §2A6.1(b)(2) for threatening the victims of his crime because there was no evidence that the defendant intended to carry out the threats. Evidence of such intent is not necessary to apply the enhancement, and where there is such evidence, a six-level enhancement is prescribed under §2A6.1(b)(1). *See also United States v. Hines*, 26 F.3d 1469 (9th Cir. 1994), *aff'd on other grounds*, 68 F.3d 481 (1995) (The district court did not err in enhancing the defendant's sentence for engaging in conduct evidencing an intent to carry out a threat pursuant to §2A6.1(b)(1)).

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[3] An amendment effective November 1, 2004, increased the base offense level at §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Sexual Abuse) in response to the PROTECT Act, to reflect the seriousness of the offenses.

[4] An amendment effective November 1, 2004, increased the base offense level for §2A4.1 (Kidnaping, Abduction, Unlawful Restraint) from level 24 to base offense level 32, in response to the PROTECT Act, Public Law 108-21.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States[5]

United States v. Melendrez, 389 F.3d 829 (9th Cir. 2004). Sentence enhancement for the defendant's use of means of identification (ID) to produce or obtain another means of identification applied where the defendant used stolen Social Security numbers to manufacture bogus identification documents in his own name or name of fictitious individual. The requirement for enhancement that both source ID numbers and produced ID numbers be of actual, not fictitious, persons other than the defendant himself did not require use, in produced document, of the actual names of persons to whom Social Security numbers were assigned.

United States v. Hardy, 289 F.3d 608 (9th Cir. 2002). The defendant contended that the district court based his sentence on an improper (retail) measure of the victim's loss. According to Application Note 2 to §2B1.1, "Ordinarily, . . . the loss is the fair market value of the particular property at issue." This case presented two measures of value for the stolen goods (DVDs): wholesale price and retail price. It was undisputed that the true owner of the DVDs intended to sell the goods in the wholesale market, and the defendant engaged the same market. Under these facts, the wholesale market value governed the loss determination, and thus the case was remanded for re-sentencing using the wholesale value as the measure of loss.

United States v. McCormac, 309 F.3d 623 (9th Cir. 2002). The defendant argued that the district court erred in its loss calculation because it should have reduced the gross amount of the debt by the amount that HCFCU recovered by repossessing and selling her car pursuant to Note 2(E)(ii) to §2B1.1. The Ninth Circuit affirmed, noting that the application notes and the commentary to the amendments did not say whether the credit against loss applied to both actual loss and intended loss. The court held that since Application Note 2(E)(ii) did not automatically require intended loss to be reduced by proceeds from disposition of collateral, its analysis was based on a calculation of the defendant's intended "pecuniary harm." Consequently, the court affirmed the district court's calculation of loss based on defendant's intention not to repay the loan and to prevent HCFCU from collecting the pledged collateral.

United States v. Morgan, 376 F.3d 1002 (9th Cir. 2004). Amendment to sentencing guidelines, excluding all interest from loss amount calculation, in sentencing defendant convicted

[5]An amendment effective November 1, 2004, referenced the new offense, 18 U.S.C. § 1037 (Fraud and Related Activity in Connection with Electronic Mail) to §2B1.1 (Theft, Fraud, or Property Destruction) in Appendix A; added an enhancement if a defendant is convicted under 18 U.S.C. § 1037 and the offense involved obtaining electronic mail addressed through "improper means"; defined "improper means"; and provided instruction in the Commentary to apply the "mass marketing" enhancement in any case in which the defendant either is convicted under 18 U.S.C. § 1037 or committed an offense that involves conduct described in 18 U.S.C. § 1037.

for financial crimes, was a clarifying amendment, warranting its retroactive application. Although the amendment did not appear in the guidelines' list of retroactive amendments, and the Sentencing Commission did not characterize amendment as either clarifying or substantive, the amendment was a result of the Sentencing Commission's efforts to resolve a conflict between the circuits in interpreting the prior loss calculation guideline.

§2B3.1 Robbery

United States v. Morgan, 238 F.3d 1180 (9th Cir. 2001). The defendant was convicted of a carjacking and kidnaping in which he tied the victim up, beat him severely, threw him in a ditch, and left him there in freezing weather. The district court imposed a four-level increase for serious bodily injury, rather than a six-level increase for permanent or life- threatening bodily injury because the circumstances under which the victim found himself were life-threatening but the actual injuries sustained as a result were not. The appellate court held that such a narrow interpretation of the types of injuries that could be considered life-threatening was contradicted by the plain language in §1B1.1(h), comment. (n.1(h)), which defines "permanent or life-threatening bodily injury" to include "maltreatment to a life-threatening degree." Because the district court believed it lacked authority to apply a six-level enhancement, the Ninth Circuit remanded for a determination of whether the treatment of the victim was life threatening.

United States v. Parker, 241 F.3d 1114 (9th Cir. 2001). A jury convicted the defendant under 18 U.S.C. § 2113(a) and (d), as well as section 924(c), for conspiracy and a series of bank robberies and firearms violations. During one of the bank robberies, a codefendant "grabbed a teller by her hair and pulled her up from the floor." *Id*. at 1118. Affirming the enhancement for forcible restraint of a victim, the court held that, under §1B1.3(b), which "holds a defendant accountable at sentencing for all reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity," the defendant could reasonably have foreseen his codefendant's physical restraint of the victim, and thus he was accountable. *Id*. *See also United States v. Shaw*, 91 F.3d 86, 89 (9th Cir. 1996) (holding a defendant not present during the planning of a robbery accountable for a co-conspirator's physical restraint of a victim during a bank robbery). However, the court reversed the enhancement with respect to a different robbery count on grounds that the conduct of pointing a gun at a bank teller and yelling at her to get down on the floor did not satisfy the "sustained focus" standard required for imposition of the enhancement.

United States v. Burnett, 16 F.3d 358 (9th Cir. 1994). The district court enhanced the defendant's base offense level by five levels, pursuant to §2B3.1(b)(2)(C), because he displayed a starter gun during the bank robbery. The circuit court vacated the defendant's sentence and remanded for the district court to determine whether the starter gun should be treated as a firearm under §2B1.3(b)(2)(C) (five-level increase) or as a dangerous weapon under §2B3.1(b)(2)(E) (three-level increase). In order for the five-level firearm enhancement to apply, the government must prove that the starter gun "will or is designed to or may readily be converted to expel a projectile by action of an explosion." §1B1.1, comment. (n.1(e)).

United States v. Napier, 21 F.3d 354 (9th Cir. 1994). The district court correctly interpreted "loss" under §2B3.1(b)(6). The defendant, convicted of bank robbery, 18 U.S.C. § 2113(a),(d), argued that no loss occurred because government agents recovered the money shortly after the offense was committed. The Ninth Circuit disagreed. The commentary to §2B3.1 refers to the commentary to §2B1.1 for determining the valuation of loss. Since "`loss' means the value of property taken, damaged or destroyed," §2B1.1, comment. (n.2), the court properly calculated the amount of loss based on the amount of money stolen from the bank.

United States v. Duran, 4 F.3d 800 (9th Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994). The defendant was convicted of robbery and use of a firearm in the commission of a robbery. Sentencing for robbery is governed by §2B3.1, and sentencing for the use of a firearm in violation of 18 U.S.C. § 924(c) is governed by §2K2.4. The district court erred by increasing the defendant's bank robbery offense level for an express threat of death under §2B3.1(b)(2)(F). Application Note 2 to §2K2.4 states, "where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use or discharge of a firearm (*e.g.*, §2B3.1(b)(2)(A)-(F) (Robbery)), is not to be applied in respect to the guideline for the underlying offense." The circuit court held that the enhancement under §2B3.1(b)(2)(F) for an express threat of death should not be applied where the defendant is convicted of the violation of 18 U.S.C. § 924(c).

United States v. Hoskins, 282 F.3d 772 (9th Cir. 2002), §1B1.3, p. 2.

§2B5.1 Offenses Involving Counterfeit Bearer Obligations of the United States

United States v. King, 257 F.3d 1013 (9th Cir. 2001), *cert. denied*, 539 U.S. 908 (2003). The defendant pled guilty to mail fraud, using a counterfeit postage meter stamp, and money laundering, stemming from a scheme where defendant mailed postcards, for which he used a counterfeit postage meter stamp, informing people that they had won $10,000, requiring that such individuals pay $15 in processing fees, then failing to award any money. The district court sentenced defendant under §2B5.1. The defendant argued that the district court should have applied the fraud guideline, §2F1.1, to his conviction for using a counterfeit postage meter stamp because §2B5.1 applies to postage stamps “that are not made out to a specific payee.” The defendant reasoned that, unlike physical stamps, a postage meter imprint has specific payees because each imprint includes the specific meter user’s authorization number, making it non-transferable and not redeemable for cash. The court rejected the defendant’s argument, holding that the difference in form of counterfeit equipment is insignificant when, as with physical stamps and a counterfeit meter, both devices are used for the same illegal purpose, free mail delivery through the postal service.

§2B5.3 Criminal Infringement of Copyright or Trademark

United States v. Bao, 189 F.3d 860 (9th Cir. 1999). The Ninth Circuit held that the retail value of items that are produced in infringement of a copyright, not the loss caused by their production, is the proper measure for determining the applicable offense level under §2B5.3.

The defendant was convicted of printing counterfeit Microsoft Windows 95 manuals. The district court concluded that the loss should be based on the retail value, and determined that each manual had a value of $50, the price that the manual would have sold for once the software on a CD-ROM was included. The defendant appealed, arguing that the value should be $12, the value of the manual sold separately. The appellate court concluded that the district court erred in assigning the value of $50 rather than the $12 amount. The appellate court noted that under the guidelines, the retail value of the counterfeit product, rather than the value of the genuine product, should be relied upon in determining the proper enhancement under §§2B5.3 and 2F1.1. *See United States v. Kim*, 963 F.2d 65, 68 (5th Cir. 1992). The appellate court rejected the government's contention that the manual's value cannot be separated out from the value of the whole package, including the CD-ROM.

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right[6]

United States v. Gillam, 167 F.3d 1273 (9th Cir. 1999). The Ninth Circuit upheld the district court's interpretation of §2C1.1(b)(2)(A) as requiring the sentencing court to increase the offense level for bribery based on the greater of the benefit to either the payer or the recipient. As a result of this interpretation of the "benefit" of bribery, the district court had used the benefit to the payer (profit of $558,000) rather than the benefit to Gillam (receipt of bribes totaling $10,075) to increase the offense level. The appellate court upheld this interpretation and resulting offense calculation even though the codefendant received substantially more bribe money ($54,500) because the district court had found that, despite the different roles and amount in bribe money received by each codefendant, they were equally involved in the offense.

[6] An amendment effective November 1, 2004, consolidated §§2C1.1 and 2C1.7 as the new bribery and extortion guideline at §2C1.1 and consolidated §§2C1.2 and 2C1.6 as the new gratuity guideline at §2C1.2; added two separate offense characteristics for "loss" and "status" and added other enhancements if the offense involved an "elected public official"or a "public official" in a high-level decision-making or sensitive position or the offender is a public official whose position involves the security of the borders of the United States; and added to commentary a clarification of the meaning of "high-level decision-making or sensitive position."

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy[7]

United States v. Mayfield, 386 F.3d 1301 (9th Cir. 2004). Imposition of a 262-month prison sentence for defendant convicted of possession with intent to distribute cocaine does not offend the Sixth Amendment as interpreted by the Supreme Court in *Blakely v. Washington*, 124 F.3d 2531 (2004), or by the Ninth Circuit in *United States v. Ameline,* 376 F.3d 967 (9th Cir. 2004). Even though the judge increased the defendant's sentence by two levels based on a finding that he possessed a firearm, the same sentence could have been imposed based solely on facts reflected by jury's verdict.

United States v. Culps, 300 F.3d 1069 (9th Cir. 2002). The defendant was convicted at a jury trial of three counts of distributing and possessing marijuana and one count of maintaining a drug house. The district court sentenced him to 88 months in prison based on the court's approximation of how much marijuana had been sold at his house over a three year period. The presentence report estimated the size of the average transaction (1/4 ounce), the estimated number of transactions per day (50), and the estimated number of days drugs were sold (1,205). At sentencing, the government relied on the presentence report and the evidence at trial, but did not independently establish the average transaction, the number of transactions per day, or the continuity of drug sales from the first controlled buy to the execution of the search warrant. The district court adopted the one-fourth ounce average transaction size and the 50 transactions per day, and multiplied these by 1,205 days, but then reduced the quantity by one half to account for uncertainties. Recognizing that a district court may adopt a multiplier method if each factor is (1) proved by the government by a preponderance of (2) reliable evidence, and (3) that the court must err on the side of caution, the Ninth Circuit held that the district court erred in adopting the presentence report's estimate with regard to average transaction size and estimated number of days that drugs were sold because the evidence was neither sufficient or reliable, and no evidence supported the supposition that the drug dealing had occurred continuously for three years.

United States v. Gamez, 301 F.3d 1138 (9th Cir. 2002), *cert. denied,* 538 U.S. 1067 (2003). The district court applied the murder cross-reference of §2D1.1(d)(1) to arrive at a base

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[7] An amendment effective November 1, 2004, added a new enhancement to §2D1.1 for distribution of a controlled substance, and the like, through the use of an interactive computer service; provided a definition of "interactive computer service"; increased penalties for GHB and GBL in the Drug Equivalency Tables by setting threshold amounts for triggering the five-year term for GHB at three gallons; and for triggering a ten-year sentence for GHB at 30 gallons; added to Commentary a reference to controlled substance analogues and the extent to which potency can be taken into account in determining the appropriate sentence; clarified that Note 12 applies to a defendant-buyer in a reverse sting operation; and provided a special instruction requiring application of the vulnerable victim adjustment under §3A1.1(b)(1) if the defendant distributes a controlled substance to another individual during the commission of a sexual offense; and repealed the current "mitigating role cap" at §2D1.1(a)(3) to replace it with an alternative approach which would provide net reductions that correspond with designated base offense levels.

offense level of 43 for first degree murder. Had the murder cross-reference not been applied, defendant would have been subject to a guideline maximum sentence of 46 months. The district court's reasoning for the application of §2D1.1(d)(1)'s murder cross-reference was that the murder was foreseeable and in furtherance of the marijuana importation conspiracy. One of the issues on appeal was whether a sentencing court could apply the murder cross-reference of §2D1.1(d)(1) to enhance a defendant's sentence for a drug-related conspiracy when it found that murder was both foreseeable and in furtherance of the conspiracy even though the defendant was acquitted of murder and the sentencing court specifically found that he did not commit murder. In accord with the district court, the Ninth Circuit noted that the fact that defendant did not pull the trigger did not foreclose the application §2D1.1(d)(1)'s murder cross-reference. The court held that application of the murder cross-reference was proper as long as the sentencing court found that the murder was both reasonably foreseeable and in furtherance of the drug-related conspiracy. *Id.*

United States v. Aquino, 242 F.3d 859 (9th Cir. 2001). The defendant pled guilty to conspiracy and possession with intent to distribute methamphetamine, as well as carrying a firearm during a drug trafficking offense, under 21 U.S.C. §§ 846, 841(a)(1), and 18 U.S.C. § 924(c). Despite guideline language expressly prohibiting the application of any offense characteristic for possession of a firearm when the court must impose a five-year statutory minimum for conviction under section 924(c), the district court imposed a two-level enhancement under §2D1.1(b)(1) for supplying codefendants with firearms. The court vacated the sentence and remanded for resentencing.

United States v. Highsmith, 268 F.3d 1141 (9th Cir. 2001). The defendant appealed the district court's finding that he was in constructive possession of a firearm during the commission of drug offenses thus warranting a two-level enhancement pursuant to §2D1.1(b)(1). The firearm was found in someone else's bedroom, along with drugs. The evidence established that the defendant had access to the bedroom and that he dealt drugs from the bedroom but there was no evidence that the defendant knew of the gun. Accordingly, there was insufficient evidence to support a finding of constructive possession and to apply the enhancement.

United States v. McLain, 133 F.3d 1191 (9th Cir. 1998). The district court properly resentenced the defendant after his section 924(c) conviction was vacated following the Supreme Court's opinion in *Bailey*. As a matter of first impression, the Ninth Circuit held that resentencing under the circumstances did not constitute double jeopardy despite the fact that the defendant had already completed that portion of the sentence connected to the underlying drug offense. The Ninth Circuit noted that following a successful section 2255 petition to vacate a section 924(c) conviction and sentence, a district court has the authority to resentence a defendant in order to correct the defendant's sentence related to the underlying offense, to reflect the possession of a weapon. Additionally, double jeopardy prohibits an increase in a defendant's sentence where there is a legitimate expectation of finality attached to the sentence. Double jeopardy is not violated when a defendant is resentenced after his section 924(c) conviction is vacated.

United States v. Scrivner, 114 F.3d 964 (9th Cir. 1997). The district court did not commit plain error when it sentenced a defendant under the sentencing formula for D-methamphetamine, rather than L-methamphetamine, when the government failed to present evidence as to which category of the drug was involved. As a matter of first impression, the Ninth Circuit held that the defendants, who were convicted of various methamphetamine offenses, failed to object during trial or sentencing about the type of drugs involved in their case, and therefore, it was not plain error for the trial court to sentence based on the more common form of D-methamphetamine. Only when a defendant seeks to challenge the factual accuracy of a matter contained in the presentence report must the district court at the time of sentencing make findings or determinations as required by Rule 32.

United States v. Parrilla, 114 F.3d 124 (9th Cir. 1996). The defendant pled guilty to two counts of cocaine distribution. On appeal, the defendant argued that the district court erred in making no specific factual findings regarding the defendant's claim that he was entrapped into trading cocaine for firearms. The Ninth Circuit agreed, vacating the sentence and remanding for further proceedings. The appellate court noted that the gun enhancement is not applicable when the defendant is able to prove sentencing entrapment by a preponderance of the evidence.

United States v. Roth, 32 F.3d 437 (9th Cir. 1994). In addressing an issue of first impression in the Ninth Circuit, the appellate court held that the district court did not err in holding that it was precluded from departing downward to a sentence of probation where the defendant was entitled to a downward departure for substantial assistance under 18 U.S.C. § 3553(e), but was subject to a mandatory minimum prison sentence under 21 U.S.C. § 841(b)(1)(A). The circuit court held that while section 3553(e) allowed the district court to disregard the minimum sentence otherwise imposed by statute, it did not authorize the court to disregard the statutory ban on probation contained in 21 U.S.C. § 841(b)(1)(A). Rather, the circuit court concluded, the probation ban in section 841(b)(1)(A) was designed to limit the discretion granted sentencing courts to depart below a mandatory minimum under 18 U.S.C. § 3553(e) by eliminating probation without imprisonment as a sentencing option.

United States v. Cruz-Mendoza, 147 F.3d 1069 (9th Cir. 1998), *cert. denied*, 528 U.S. 1013 (1999). The court of appeals determined that a section of Amendment 518 made a substantive change to the guidelines and therefore could not be applied retroactively. The relevant portion of Amendment 518 provides that, in a reverse sting, the court shall exclude from relevant conduct the amount that the defendant did not intend to produce and was not reasonably capable of producing. *See also United States v. Felix*, 87 F.3d 1057 (9th Cir. 1996) (the court erred by failing to apply §2D1.1, comment. (n.12), retroactively for the purpose of calculating drug amounts at sentencing because the amendment thereto was clarifying).

§2D1.8 Renting or Managing a Drug Establishment; Attempt or Conspiracy

United States v. Leasure, 319 F.3d 1092 (9th Cir. 2003). The issue on appeal was whether §2D1.8 simply establishes a base offense level, which the government must prove, or if it provides for both a base offense level and a mitigating departure, which a defendant must

prove. The Ninth Circuit held that under §2D1.8 the government must prove the facts relevant to obtain the base offense level it seeks. In this case, even though the district court erred by requiring the defendant to prove nonparticipation, the error was nonetheless harmless. The evidence of defendant's participation in the manufacturing of drugs was overwhelming; had the district court placed the burden of proof on the government, the burden had been met.

§2D1.11 Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical[8]

United States v. Alfaro, 336 F.3d 876 (9th Cir. 2003). The district court applied a 14-level upward departure because the defendant's importation of iodine was large scale. On appeal, the Ninth Circuit affirmed the departure but determined that the extent of the departure was unreasonable. The court reasoned that the district court's methodology in calculating the upward departure amounted to the defendant being sentenced under §2D1.11, a guideline provision not applicable to his case. Further, the departure also violated the *ex post facto* clause. Accordingly, the Ninth Circuit vacated the sentence and remanded for resentencing.

Part F [Deleted]

§2F1.1 Fraud and Deceit[9]

United States v. Morgan, 376 F.3d 1002 (9th Cir. 2004). The district court erred in including interest and finance charges in its calculation for actual loss for sentencing purposes. The defendant was sentenced under §2F1.1, which did not specify whether interest and finance charges were a part of the loss calculation. A circuit split developed and the Commission resolved the problem as part of Amendment 617. The Ninth Circuit determined that since the portion of the Amendment applicable in this case was resolving a circuit split on the issue rather than reflecting a change in substantive law, the revision was a clarification. Clarifications are applied retroactively, and the defendant's sentence was vacated and remanded so that interest and finance charges would not be considered in the loss calculation.

United States v. Riley, 335 F.3d 919 (9th Cir. 2003). The defendant pled guilty to conspiracy to produce fictitious obligations, possession of fictitious obligations, and identification fraud. On appeal, one of his arguments was that the district court erred by applying

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[8] An amendment effective November 1, 2004, added a new enhancement to §2D1.11 for distribution of a controlled substance, listed chemical, or prohibited equipment, through the use of an interactive computer service; also provided, in a corresponding Application Note, a definition of "interactive computer service"; provided two corresponding quantity options, similar to options added to §2D1.1 for GHB, for increasing penalties for GBL, a precursor of GHB; provided statutory re-designations in §2D1.11; added white phosphorus and hypophosphorous acid (direct substitutes for red phosphorus in the production of methamphetamine) to the Chemical Quantity Table; added a mitigating role reduction to §2D1.11, similar to that provided under §2D1.1, which provides net reductions that correspond with designated offense levels.

[9] Effective November 1, 2001, §§2F1.1, 2B1.2, and 2B1.3 were deleted by consolidation with §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). *See* USSG App. C, amendment 617.

a two-level enhancement under §2F1.1(b)(5)(C)(ii) for possession of five or more means of identification. The defendant argued that in order to trigger this enhancement, the five pieces of identification must be of actual, as opposed to fictitious, individuals. Although a postal inspector testified that some of the names on the identifications were of actual people, the government presented no evidence showing specifically how many of the seized identifications were of actual people. Thus, the Court of Appeals held that the evidence did not support a finding that the defendant possessed false identifications of at least five actual people, and the district court clearly erred in applying the enhancement.

Part G Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity

§2G1.1 Promoting a Commercial Sex Act or Prohibited Sexual Conduct[10]

United States v. Hughes, 282 F.3d 1228 (9th Cir. 2002). The court reviewed whether the cross-reference to §2G2.1, contained in §2G1.1(c)(1), applies when the defendant's primary purpose in causing the juvenile to engage in sexually explicit conduct was sexual gratification, but the secondary purpose was to produce a visual depiction, which triggers the cross-reference. The court determined that the text, context, purpose, and legislative history of the cross-reference, along with case law, direct the broad application of the cross-reference.

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002). Pursuant to §2G1.1(b)(1), the district court applied a four-level enhancement because the Mann Act violations involved physical force. The defendant argued that two of the Mann Act offenses at issue did not specifically involve physical force in the actual interstate travel and thus because the force was not specific to the interstate travel, the enhancement could not apply. The court rejected this argument, ruling that the physical force does not have to relate to the elements of the Mann Act violations, but instead those offenses must merely involve physical force in some fashion. Here, the physical force enhancement was justified because violence occurred to further the overall prostitution scheme.

[10] An amendment effective November 1, 2004, made conforming changes to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct); and added a special instruction to apply §3D1.2 (Groups of Closely Related Counts) as if there had been a separate count of conviction for each victim in those cases in which more than one victim died.

§2G2.1 Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production[11]

United States v. Hughes, 282 F.3d 1228 (9th Cir. 2002), §2G1.1, p. 15.

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic[12]

United States v. Kemmish, 120 F.3d 937 (9th Cir. 1997). The defendant pled guilty to failing to report transportation of currency, making a false statement, and various child pornography offenses. In a cross-appeal, the government argued that the district court erred by failing to enhance the defendant's sentence because his conduct as a major distributor of child pornography amounted to a pattern of sexual exploitation of minors. In a case of first impression, the Ninth Circuit concluded that the defendant's extensive activities as a trafficker in child pornography did not constitute a pattern of sexual exploitation of minors. The appellate court reasoned that a "pattern of activity" for the purposes of §2G2.2(b)(4) means a combination of two or more separate instances of sexual abuse or sexual exploitation involving the same or different victims. The few reported decisions involving 18 U.S.C. § 2251(c) and §2G2.2(b)(4) have unanimously interpreted sexual exploitation of a minor as being inapplicable to traffickers in child pornography who are not directly involved in the sexual abuse. Section 2G2.1 sets out the various forms of exploitation of a minor which are prohibited. No guideline refers to the possession of, transporting, trafficking, or reproducing of child pornography as "sexual abuse" or "exploitation of a minor." Therefore, the Ninth Circuit concluded that the five-level sentence enhancement did not apply in this case. Note: USSG §2G2.2 was amended on this issue effective November 1, 1997 (Amendment 537).

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[11] An amendment effective November 1, 2004, increased the base offense level in §2G2.1 to reflect the increase in the statutory maximum from 10 to 15 years for offenses under 18 U.S.C. § 2251; added a number of enhancements associated with the production of child pornography; and added to the Commentary definitions of the following terms: "sexual act," "sexual contact," "sexually explicit conduct," "computer," "interactive computer service," "minor," and "distribution."

[12] An amendment effective November 1, 2004, consolidated §§2G2.2 and 2G2.4 to avoid confusion in the application of these guidelines; provided alternative base offense levels, if the defendant was convicted of 18 U.S.C.§ 2252(a)(4), 2252A(a)(5) (possession offenses) or § 1466 (solicitation offense), and a separate offense level for all other offenses; added a number of enhancements related to trafficking and receipt of child pornography; broadens the computer enhancement to include "interactive computer" as defined in 47 U.S.C. § 230 (f)(2) and to apply to offenses in which the computer (or an interactive computer service) was used for possession of pornographic material; added Commentary to §2G2.2 which counts each video, video-clip, movie, or similar recording as having 75 images; made several other minor changes to §2G2.2, Commentary, such as providing the definitions of "computer" and "image"; clarified existing definitions of "minor" and "distribution"; and clarified that a defendant does not need to intend to possess, receive, or distribute sadistic or masochistic images for application of this enhancement.

United States v. Rearden, 349 F.3d 608 (9th Cir. 2003). The defendant appealed his sentence for e-mailing graphic child pornography images to another man, arguing that the district court erred by enhancing his sentence four levels under §2G2.2(B)(3), contending that the district court mistakenly concluded that any conduct involving anal penetration of a child is *per se* sadistic. The court of appeals affirmed the four- level enhancement under §2G2.2(b)(3) for transmitting "material that portrays sadistic or masochistic conduct or other depictions of violence," where the evidence established that at least two of the images transmitted depicted the anal penetration of young prepubescent children by adult males. The appellate court concluded that the district court was well within its discretion to conclude that what was shown in the pictures was necessarily painful and thus sadistic. The defendant also argued that the visual depiction of a child being sexually molested is already covered by the base offense level for shipping material involving the sexual exploitation of a minor, so that more than penetration must be shown for the "sadistic" enhancement to apply. The court of appeals held that this was not correct, because §2G2.2(b)(3) is narrower than the base offense level which could, for example, involve pictures of a naked child without physical sexual contact. Accordingly, the court affirmed the enhancement.

Part H Offenses Involving Individual Rights

§2H4.1 Peonage, Involuntary Servitude, and Slave Trade

United States v. Veerapol, 312 F.3d 1128 (9th Cir. 2002), *cert. denied*, 538 U.S. 981 (2003). The defendant was convicted of involuntary servitude, mail fraud, and harboring aliens. The district court adjusted the defendant's base offense level upward two levels under §3A1.1(b)–the "vulnerable victim" enhancement. On appeal, the Ninth Circuit affirmed the vulnerable victim enhancement. The court reasoned that the specific offense characteristics under §2H4.1(b) did not provide an adjustment for victim characteristics such as the victim's immigrant status and the linguistic, educational, and cultural barriers that contributed to her remaining in involuntary servitude.

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

United States v. Arias, 253 F.3d 453 (9th Cir. 2001). The defendant was convicted of witness intimidation but was acquitted of the underlying drug offenses for whose obstruction the intimidation served. The district court erroneously refused to apply a higher enhancement for obstruction of justice under the cross-reference to §2X3.1, believing that it was not permissible because the defendant was acquitted of the underlying offenses. Deciding an issue of first impression, the court held that §2J1.2(c)(1)'s requirement to apply §2X3.1 (Accessory After the Fact) should be followed regardless of whether or not the underlying offense was proved by a preponderance of the evidence or any other standard of proof. The court reasoned that not doing so would defeat the very purpose of the cross reference–to ensure that the sentence reflects the seriousness of the obstruction where it, in turn, depends on the seriousness of the underlying

offense. "[O]therwise 'perjurers would be able to benefit from perjury that successfully persuaded' a jury not to convict." 253 F.3d at 461 (citations omitted).

§2J1.6 Failure to Appear by Defendant

United States v. Gray, 31 F.3d 1443 (9th Cir. 1994). A sentence for failure to appear could be made consecutive to a sentence for the underlying offense even though the sentence for the underlying offense had not yet been imposed.

§2J1.7 Commission of Offense While on Release

United States v. Kentz, 251 F.3d 835 (9th Cir. 2001). The defendant was convicted of telemarketing fraud. While he was on pretrial release, he continued to engage in telemarketing fraud in violation of the pretrial release order. Subsequently, the district court enhanced his sentence pursuant to 18 U.S.C. § 3147 and USSG §2J1.7. On appeal, the defendant argued that such an enhancement was a violation of due process because he was not specifically warned in the pretrial order that such an enhancement could be applied. Noting a circuit split on the issue, the Ninth Circuit sided with the majority of the circuits in holding that the lack of such a warning does not preclude the sentencing enhancement because the enhancement statute itself does not require such a warning. The guidelines do not require such a warning because the notice requirement in the Commentary of §2J1.7 is a "pre-*sentence* requirement rather than a pre-release requirement." 251 F.3d at 841.

United States v. Tavakkoly, 238 F.3d 1062 (9th Cir. 2001). The district court did not err by considering the commission of the offenses while on pretrial release both to enhance his sentence for the instant crime and to impose a separate consecutive sentence for violating the terms of pretrial release.

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition[13]

United States v. Lam, 20 F.3d 999 (9th Cir. 1994). The district court did not err in declining to extend the reduction for failure to register a firearm where the firearm was used only

[13] An amendment effective November 1, 2004, increased the enhancement, for the offense involving a destructive device if the destructive device was a man-portable air defense system (MANPADS), portable rocket, missile, or device used for launching a portable rocket of missile; but maintained a two-level enhancement for all other destructive devices; provided an upward departure for non-MANPADS destructive devices where the two-level enhancement for such devices did not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk of public welfare, and the risk of death or serious bodily injury that the destructive device created; adopted the statutory definition of "destructive devices" provided in 26 U.S.C. § 5845(f) as the guideline definition and similarly substituted statutory definitions for the definitions of "ammunition" and "firearm," and increased guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved the use of a MANPADS or similar destructive devices.

for sporting or collection purposes to firearms used for self-defense. The fact that self-defense is a lawful use does not mitigate the defendant's registration offense.

United States v. Routon, 25 F.3d 815 (9th Cir. 1994). The district court did not err in finding that the defendant possessed a firearm "in connection with" the felony for which he was convicted pursuant to §2K2.1(b)(5). The circuit court agreed with the Tenth Circuit's approach in *United States v. Gomez-Arrellano*, 5 F.3d 464 (10th Cir. 1993), which found 18 U.S.C. § 924(c)'s phrase "in relation to" to be an appropriate guide in determining the meaning of §2K2.1(b)(5)'s phrase "in connection with" because there is no difference "in the common understandings" between the two phrases. Therefore, the government must prove a firearm was possessed in a "manner that permits an inference that it facilitated or potentially facilitated . . . the defendant's felonious conduct."

United States v. Wenner, 351 F.3d 969 (9th Cir. 2003). The defendant pled guilty to being a felon in possession of a firearm. The defendant argued that his state convictions for residential burglary and attempted residential burglary were not crimes of violence under §4B1.2(a)(2). The court of appeals agreed that the Washington residential burglary statute did not meet the definition of "burglary of a dwelling" under §4B1.2(a)(2), holding that the scope of the Washington statute exceeded the federal definition. Because the residential burglary was not a crime of violence under §4B1.2(a)(2), the defendant's state conviction for attempted residential burglary also was not a crime of violence. Because neither Washington residential burglary nor attempted residential burglary is a crime of violence, the district court erred in enhancing Wenner's sentence under § 2K2.1(a)(1).

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

United States v. Angwin, 271 F.3d 786 (9th Cir. 2001). The defendant challenged the district court's §2L1.1(b)(5) upward adjustment due to the substantial risk of death or serious bodily injury to another person created by the defendant. The district court applied the enhancement because the defendant drove a motor home with 16 (14 aliens) people, although it was rated to hold 6. None of the aliens utilized a seatbelt. The district court did not err, particularly because Application Note 6 explains that the enhancement applies to a "wide variety of conduct [including] carrying substantially more passengers than the rated capacity of a motor vehicle . . ., or harboring persons in a crowded, dangerous, or inhumane condition."

United States v. Ramirez-Martinez, 273 F.3d 903 (9th Cir. 2001). An increase in the base offense level under the sentencing guidelines for creating substantial risk of death or bodily injury was appropriate, where the defendant drove a dilapidated van with 20 people inside, without seats or seatbelts.

United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001). An increase in the base offense level under the sentencing guidelines for creating the substantial risk of death or bodily

injury was appropriate. The defendants were aware of the potential dangerous conditions of the journey but nevertheless proceeded with the trip through rugged terrain despite the immigrants' obvious lack of adequate food, water, clothing, and protection from the elements. Moreover, even though the snowstorm which occurred was unanticipated, the defendants knew the conditions and dangers of proceeding so ill-equipped.

United States v. Herrera-Rojas, 243 F.3d 1139, 1144 (9th Cir. 2001). Upon finding the necessary intent to create substantial risk under §2L1.1(b)(5), additional intent is not necessary to increase a sentence under §2L1.1(b)(6).

United States v. Lopez-Garcia, 316 F.3d 967 (9th Cir. 2003). The district court erred in applying §3C1.2 in addition to §2L1.1(b)(5) in sentencing the defendant. The defendant sped away from the border checkpoint until she was apprehended; she was attempting to flee from the agents. Because the district court's application of §2L1.1(b)(5) enhancement was due to the defendant's reckless flight from law enforcement officers, under Application Note 6 to §2L1.1, the district court should not have enhanced the defendant's offense level for reckless endangerment during flight under §3C1.2.

§2L1.2 Unlawfully Entering or Remaining in the United States[14]

United States v. Alvarez-Gutierrez, 394 F.3d 1241 (9th Cir. 2005). For purposes of the sentencing guideline that provided for an eight-level increase when a defendant was previously deported after conviction of an aggravated felony, the defendant's prior gross misdemeanor conviction under Nevada state law for statutory sexual seduction constituted a conviction for "sexual abuse of a minor" under immigration law defining an aggravated felony as murder, rape, or sexual abuse of a minor.

United States v. Lopez-Zamora, 392 F.3d 1087 (9th Cir. 2005). The defendant raised a challenge to the 16-level enhancement pursuant to *Blakely v. Washington*, 124 S. Ct. 2531 (2004). Because the sentencing court can impose a sentence based on a defendant's prior conviction, the district court had the authority to enhance Lopez-Zamora's sentence regardless of the requirements that may arise if *Blakely* applies to the guidelines.

Ferreira v. Ashcroft, 390 F.3d 1091 (9th Cir. 2004). An alien's California state court conviction of submitting a false statement to obtain aid in violation of the California Welfare and Institutions Code necessarily involved fraud or deceit, and therefore qualified as an "aggravated felony."

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[14] An amendment effective November 1, 2004, added an Application Note permitting §2L2.2 (Fraudulently Acquiring Documents), arising from the same course of conduct, to be grouped with§2L1.2 (Unlawful Entry) under §3D1.2 (Multiple Counts); clarified that "use" includes cases involving an attempt to renew previously issued passports; provided an upward departure provision for cases involving a defendant who fraudulently obtained or used a United States passport intending to enter the United States to engage in terrorist activity; and provided a four-level enhancement if the defendant fraudulently obtained or used a United States passport.

United States v. Lopez-Patino, 391 F.3d 1034 (9th Cir. 2004). In sentencing the defendant for unlawful reentry following deportation, the imposition of 16-level enhancement based on prior "crime of violence" for Arizona conviction of child abuse was proper under modified categorical approach, where the transcript, indictment, and judgment adequately established that crime involved spanking that caused child bruising.

United States v. Pimentel-Flores, 339 F.3d 959 (9th Cir. 2003). The court addressed, as an issue of first impression, whether a "crime of violence" must be limited to "aggravated felonies" under §2L1.2 as it was amended in 2001. The court held that a "crime of violence" need only to be a "felony" as defined in the application notes of §2L1.2, and not an "aggravated felony" as statutorily defined in 8 U.S.C. § 1101(a)(43), to qualify for a 16-level enhancement. The court noted that the plain language of the guideline so demonstrates. The court stated that although the phrase "crime of violence" appears in both the statute and the new guideline, the new guideline takes care to include its own definition. Significantly, the guideline definition is different from the statutory definition of that phrase.

United States v. Maria-Gonzalez, 268 F.3d 664 (9th Cir. 2001). The defendant appealed the district court's aggravated felony enhancement under §2L1.2(b)(1)(A), arguing that because his 1992 conviction was not an aggravated felony at the time of his 1993 deportation, that conviction could not qualify as an aggravated felony. The Supreme Court has ruled that classification of an offense as an aggravated felony applies retroactively. *See INS v. St. Cyr*, 533 U.S. 289 (2001). Moreover, the offense of illegal reentry occurred after the 1992 conviction was classified as an aggravated felony, and the language of the statute, the legislative history, and the guidelines all establish that it is the classification of a prior conviction as an aggravated felony at the time of the reentry violation that justifies the aggravated felony status.

United States v. Portillo-Mendoza, 273 F.3d 1224 (9th Cir. 2001). DUI convictions in California do not qualify as an aggravated felony.

United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001). A California DUI with bodily injury conviction did not qualify as a "crime of violence." *See also Leocal v. Ashcroft*, 125 S. Ct. 377 (2004) (a conviction for DUI and causing serious bodily injury was not a crime of violence).

United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001) (*en banc*). A California conviction for offering to transport, sell, or give away marijuana, was not an aggravated felony under the California approach, but the court remanded for determination of whether the record includes "judicially noticeable facts" that would qualify the offense as an aggravated felony.

United States v. Robles-Rodriguez, 281 F.3d 900 (9th Cir. 2002). Arizona convictions for drug possession not punishable by imprisonment for more than one year was not an aggravated felony.

United States v. Soberanes, 318 F.3d 959 (9th Cir. 2003). A State conviction for attempted possession of more than eight pounds of marijuana is an "aggravated felony" within the meaning of §2L1.2(b)(1)(C), after the November 1, 2001 amendment.

United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002) (*en banc*). A California state conviction for the petty theft of cigarettes and beer did not constitute an aggravated felony for §2L1.2(b)(1)(A) enhancement purposes.

United States v. Galindo-Gallegos, 244 F.3d 728 (9th Cir. 2001). A conviction for transporting aliens within the United States constituted an aggravated felony under §2L1.1.

United States v. Grajeda-Ramirez, 348 F.3d 1123 (9th Cir. 2003). Colorado's reckless vehicular assault statute is a predicate "crime of violence" for the purposes of the sentencing guidelines.

United States v. Hernandez-Castellanos, 287 F.3d 876 (9th Cir. 2002). An Arizona conviction for endangerment does not qualify as an aggravated felony under §2L1.21(b)(1)(A) under the categorical approach.

United States v. Baron-Medina, 187 F.3d 1144 (9th Cir. 1999). The district court properly imposed the 16-level enhancement under §2L1.2(b)(1)(A). "Sexual abuse of a minor" is listed as an aggravated felony in 8 U.S.C. §1101(a)(43) and the conduct reached by the California Statute (California Penal Code § 288(a)), indisputably falls within the common, everyday meanings of the words "sexual" and "minor." Thus, the Ninth Circuit held that the California crime of lewd or lascivious act on a child under 14 years was an aggravated felony under §2L1.2.

United States v. Pereira-Salmeron, 337 F.3d 1148 (9th Cir. 2003). A Virginia conviction for carnal knowledge of a child, without the use of force, was a crime of violence under §2L1.2.

United States v. Medina-Maella, 351 F.3d 944 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2924 (2004). A prior felony conviction for lewd or lascivious acts upon a child under the age of 14 years was a "crime of violence" for purposes of §2L1.2.

United States v. Ibarra-Galindo, 206 F.3d 1337 (9th Cir. 2000). A State felony conviction for possession of 0.4 grams of cocaine which would not be a felony under federal jurisdiction is a drug trafficking crime which could predicate an aggravated felony enhancement under §2L1.2.

United States v. Echavarria-Escobar, 270 F.3d 1265 (9th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002). The defendant appealed the district court's aggravated felony enhancement under §2L1.2(b)(1)(A), contending that because his prior theft offense sentence was suspended, it did not constitute an aggravated felony. Reviewing for plain error, the court disagreed. Relying

on the language of 8 U.S.C. § 1101(a), which defines aggravated felonies, the court joined all other circuits in ruling that whether a sentence is suspended is immaterial to the aggravated felony question.

United States v. Garcia-Gomez, 380 F.3d 1167 (9th Cir. 2004). The defendant was convicted of being an alien found in the United States after deportation. He challenged his sentence on appeal, asserting that the court incorrectly calculated his offense level and criminal history category. The defendant argued that his prior 31-month sentence was suspended after 8 months, so it was error under §§2L1.2 and 4A1.2 to take into account those portions of a sentence that were suspended when calculating his offense level and criminal history category. The Court of Appeals held that a decision to release a defendant early must be made by a judge in order for it to qualify as a suspended sentence. Because the defendant was released through an administrative agency determination, his lesser sentence did not qualify as a "suspended" sentence.

United States v. Gonzalez-Tamariz, 310 F.3d 1168 (9th Cir.), *cert. denied*, 538 U.S. 1008 (2003). The Ninth Circuit joined the Second, Third, Fifth, Tenth, and Eleventh Circuits in holding that an offense classified as a misdemeanor under state law may nevertheless be considered an aggravated felony for sentencing purposes if it meets the requirements of 8 U.S.C. § 1101(a)(43). Thus, the defendant who was convicted of battery, labeled a gross misdemeanor with a one-year maximum sentence, was properly considered an aggravated felony because it is a crime of violence and the (suspended) term of imprisonment was one year.

United States v. Hernandez-Valdovinos, 352 F.3d 1243 (9th Cir. 2003). A suspended sentence that imposed incarceration as a condition of probation constituted a "sentence imposed" for purposes of §2L1.2.

United States v. Moreno-Cisneros, 319 F.3d 456 (9th Cir.), *cert. denied*, 124 S. Ct. 840 (2003). The defendant was convicted of illegal reentry into the United States and was subject to a 16-level enhancement sentence for a prior state drug conviction. The issue on appeal was whether, notwithstanding Application Note 1(A)(iv), which excludes any time suspended, the three-year prison sentence imposed by the state court after defendant's probation was revoked was included in the calculation of the length of the "sentence imposed" under §2L1.2(b)(1)(A)(I). The Ninth Circuit, analogizing §4A1.2, held that the prison sentence imposed after revocation of probation should be included in calculating the length of the sentence imposed for the prior offense.

United States v. Machiche-Duarte, 286 F.3d 1153 (9th Cir. 2002). The United States appealed the district court's downward departure under §2L1.2, Application Note 5. The district court departed under that note but relied on several factors which are not discussed by the note. Moreover, Application Note 5 expressly precludes departure under its authority where the defendant has multiple previous felony convictions, as was the case here. Because this requirement was not met, and because the three Application Note 5 prongs are prerequisites to a sentencing departure under its authority, the district court erred in departing under it.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

United States v. Novak, 284 F.3d 986 (9th Cir. 2002). The defendant appealed the district court's refusal to adjust downward seven levels under §2P1.1(b)(2). The decision defined when an escape begins to determine whether a defendant is entitled to the seven-level downward adjustment for returning to custody voluntarily within 96 hours of the escape. The court held that an escape begins when the prisoner departs from lawful custody with the intent to evade detection, even if no one is aware of the escape at that time and thus affirmed the district court's decision.

United States v. Patterson, 230 F.3d 1168 (9th Cir. 2000). The defendant pled guilty to escaping from custody, in violation of 18 U.S.C. § 751(a), after failing to return to a community corrections facility while on work release. At the time of his escape, the defendant was completing a 12-month custody sentence for having violated the conditions of a supervised release term imposed subsequent to a prior conviction for unlawful use of a communication facility. Finding that at the time of the escape, the defendant was in custody "by virtue of" the conviction for unlawful use of a communication facility, the district court sentenced the defendant under §2P1.1(a)(1), which mandates an offense level of 13. The defendant challenged his sentence, arguing that the district court should have applied the base offense level in §2P1.1(a)(2). The appellate court held that "when supervised release is imposed as part of a sentence and then revoked in subsequent proceedings, the resulting confinement is 'by virtue of' the original conviction, and therefore, §2P1.1(a)(1) applies." The court reasoned that but for the original offense, there would have been no supervised release to violate and be revoked, resulting in a return to custody.

Part Q Offenses Involving the Environment

§2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce[15]

United States v. Pearson, 274 F.3d 1225 (9th Cir. 2001). The defendant contended that the district court improperly enhanced his sentence because there were insufficient facts to support findings that hazardous substances were discharged into the environment, resulting in a

[15] An amendment effective November 1, 2004, adds a two-level enhancement to §2Q1.2 for a defendant convicted under 49 U.S.C. § 5124 or § 46312; provides an upward departure provision if the offense resulted in extreme psychological injury or was calculated for terroristic activity; and deletes 49 U.S.C. § 60123(d) (penalty provision) from the statutory provisions referred to in §2Q1.2.

substantial likelihood of death or serious bodily injury, per §2Q1.2(b)(1)(B). That guideline, interpreted in conjunction with Application Note 5, requires a release or emission of a hazardous or toxic substance or pesticide "into the environment,"*United States v. Ferrin*, 994 F.2d 658, 662 (9th Cir. 1993), and a showing that the environment was actually contaminated by the substance, *United States v. Van Loben Sels*, 198 F.3d 1161, 1164 (9th Cir. 1999). Here, the district court found that asbestos dust was emitted into the air thus warranting the enhancement. Similarly, the district court properly enhanced the sentence nine levels under §2Q1.2(b)(2) because the offense resulted in a substantial likelihood of death or serious bodily injury. The enhancement was based upon the defendant's noncompliance with work practice standards resulting in workers being exposed to life-threatening asbestos fibers.

United States v. Technic Services, Inc., 314 F.3d 1031 (9th Cir. 2002). On appeal, the defendant objected to the district court's six-level upward adjustment pursuant to §2Q1.2(b)(1)(A). Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. *See* §2Q1.2, comment. n. 5. The district court did not err by upwardly adjusting the defendant's offense level under §2Q1.2. The record showed that during long periods of time, the facility and the powerhouse were contained for purposes of asbestos abatement. Consequently, it was a reasonable inference to assume that contamination had occurred.

§2Q1.3 Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

United States v. Phillips, 356 F.3d 1086 (9th Cir. 2004). The defendant was convicted of multiple violations of the Clean Water Act and conspiracy to violate the Clean Water Act. On appeal, the government argued that the district court erred in not including in its calculation of cleanup expenses under §2Q1.3(b)(3). The Ninth Circuit held that the plain language of §2Q1.3(b)(3) supported a conclusion that the sentencing court must include reliable CERCLA expenses. The court found that a district court must include all reliable cleanup costs in its calculation of whether a defendant's actions required a substantial expenditure for cleanup. Accordingly, the court vacated defendant's sentence and remanded to allow the district court to make the necessary calculation armed the court's interpretation of §2Q1.3(b)(3) so the district court could include any reliable CERCLA-related expenses in its §2Q1.3(b)(3) calculation.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity[16]

United States v. Lomow, 266 F.3d 1013 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 845 (2003). The district court properly sentenced the defendant under the money laundering guideline. Pursuant to Appendix A of the guidelines and Amendment 591, §2S1.1 is the appropriate guideline for a 18 U.S.C. § 1956 conviction.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

United States v. Bishop, 291 F.3d 1100 (9th Cir.), *cert. denied*, 537 U.S. 1176 (2002). The defendant challenged the district court's tax loss calculation. The court considered two of the defendant's arguments, deeming a third contention waived because it was not raised below. First, defendant claimed that the district court should have used "married filing jointly" status, instead of "married filing separately," the use of which resulted in a higher tax loss. The court decided that because the tax loss would have been the same under either status, there was no error: it reached this conclusion because tax loss includes the reasonably foreseeable conduct of all co-actors and thus under either status, the defendant's spouses income would have to be included. Second, the defendant claimed that the district court erred because it did not itemize the deductions to which he was entitled. According to the defendant, the district court should not have used the standard deduction, but rather, should have itemized, because itemizing permits a "more accurate determination" of tax loss than the default 20 percent of the gross income set forth in §2T1.1(c)(2). Because the defendant failed to produce evidence in support of itemized deductions, the court ruled that using the standard deduction was a reasonable estimate given the available facts, citing §2T1.1, comment. (n.1).

United States v. Brickey, 289 F.3d 1144 (9th Cir. 2002). The district court imposed both a two-level enhancement under §3B1.3 for abuse of a position of trust and under §2T1.1(b)(1) for "fail[ing] to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity." The district court based the enhancement on the fact that the defendant was an INS border inspector who received bribes in return for letting cars pass through the border without routine inspection. The court reasoned that because the §2T1.1(b)(1) enhancement applies regardless of the manner in which the illegal income was derived (*i.e.,* whether it

[16] Effective November 1, 2001, the Commission consolidated §§2S1.1 and 2S1.2 into a single new guideline, §2S1.1, which resulted in increased penalties for defendants who laundered funds derived from more serious underlying criminal conduct, and decreased penalties for defendants whose laundered funds derived from less serious underlying conduct. *See* USSG App. C, Amendment 634.

involved an abuse of a position of trust), both enhancements are appropriate where the conduct has been committed by abusing a position of trust, because the abuse of position of trust was not taken into account by the §2T1.1(b)(1) enhancement.

United States v. Kienenberger, 13 F.3d 1354 (9th Cir. 1994). The district court erred when it failed to consider preguidelines conduct in determining the defendant's tax loss under §2T1.1. The government argued that the inclusion of the defendant's preguideline tax evasion did not violate the *ex post facto* clause because it is part of a "continuing pattern of violations of the tax laws by the defendant," §2T1.1, comment. (n.2) which is presumed to be "part of the same course of conduct" for purposes of §1B1.3(a)(2). The Ninth Circuit agreed and joined several other circuits in so holding. *See United States v. Regan*, 989 F.2d 44 (1st Cir. 1993); *United States v. Haddock*, 956 F.2d 1534 (10th Cir.), *cert. denied*, 506 U.S. 828 (1992).

Part X Other Offenses

§2X3.1 Accessory After the Fact

United States v. Arias, 253 F.3d 453 (9th Cir. 2001). When a defendant is convicted of tampering with a witness, the offense level for obstruction is driven by the offense level of the crime whose prosecution was obstructed. The sentencing guidelines accomplish this by a cross reference from USSG §2J1.2, the obstruction guideline, to §2X3.1. Section 2X1.3 must be applied when the resulting offense level is higher.

§2X5.1 Other Offenses

United States v. Van Krieken, 39 F.3d 227 (9th Cir. 1994), *cert. denied*, 514 U.S. 1075 (1995). The defendant asserted that the district court applied the incorrect guideline in sentencing him upon his conviction for corrupt interference with the administration of tax laws, in violation of 26 U.S.C. § 7212(a). The district court sentenced the defendant using §2J1.2(a), Obstruction of Justice, as opposed to §2T1.5, Fraudulent Returns, Statements, or Other Documents. Under §1B1.2, the commentary provides that the court will "determine which guideline section applies based upon the nature of the offense charged in the count of which the defendant was convicted," when the "particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines." In this case, the district court correctly followed the method set forth in §2X1.5, which instructs the court to determine the most analogous guideline. The district court properly analogized the defendant's conduct in filing false tax returns and seeking a tax levy on innocent tax payers, among other conduct, to obstruction of justice.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

United States v. Wright, 373 F.3d 935 (9th Cir. 2004). The district court applied both a two-level vulnerable victim enhancement because of the victim was an 11-month old infant and a four-level adjustment where the victim was less than 12 years of age. The defendant argued because that the four-level adjustment under §2G2.1(b)(1)(A) took into account the victim's age, the vulnerable victim adjustment should not have been applied . The district court applied the vulnerable victim enhancement based on the victim's extremely young age and small physical size. The court noted that children pass through different stages of development which include infancy and toddler and these stages may be separated from the child's age. The guideline does not take into consideration these especially vulnerable stages, so there is no double-counting of age when considering infancy or the toddler stage as an additional factor of vulnerability. The appellate court affirmed the sentence.

United States v. Mendoza, 262 F.3d 957 (9th Cir. 2001). Pursuant to §3A1.1(b)(1), the district court imposed a two-level enhancement, because the defendant targeted illegal aliens in committing the offense of selling false employment documents. The defendant contested "class-based" vulnerability. The court explained that what made the victims vulnerable was not that they were Hispanic but that they were in the United States illegally (and thus would not investigate or report the defendant), they were unfamiliar with immigration law, they were not well educated, they could not speak or read English, and the defendant hold himself out as sophisticated and knowledgeable in INS procedures. The defendant was convicted of three offenses: 1) conspiracy to commit an offense against the United States, 2) sale of immigration documents, and 3) pretending to be a federal employee and obtaining money by so pretending. Because of the breadth of these convictions, the court ruled that not all of the victims are vulnerable in the same way for the same reasons. Therefore, the characteristics that made the victims vulnerable were not typically associated with the victims of the offenses and thus the victims were particularly vulnerable and the district court did not clearly err in applying the enhancement.

United States v. Fontenot, 14 F.3d 1364 (9th Cir. 1994). The district court erred in applying a two-level upward adjustment because of either an abuse of a position of trust pursuant to §3B1.3 or vulnerable victim pursuant to §3A1.1, posed in the alternative, in sentencing a defendant convicted of traveling in interstate commerce to contract the murder-for-hire of his wife. The Ninth Circuit found that the defendant's spousal relationship did not create a position of trust that significantly facilitated the commission or concealment of the offense to justify enhancement under §3B1.3. The Ninth Circuit likewise found defendant's status as the intended victim's spouse did not justify enhancement under §3A1.1 because the spousal relationship did not make her any more vulnerable than any other intended victim of a murder-for-hire.

United States v. Kentz, 251 F.3d 835 (9th Cir. 2001). The sentencing guidelines provision allowing for an offense level increase when offense involved "a large number of vulnerable victims" was triggered by finding that the defendant's telemarketing fraud involved 300 vulnerable victims.

United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). The appellate court affirmed the district court's determination that the family was also a victim, holding that "courts properly may look beyond the four corners of the charge to the defendant's underlying conduct in determining whether someone is a 'vulnerable victim' under section 3A1.1."

United States v. O'Brien, 50 F.3d 751 (9th Cir. 1995). The appellate court rejected the argument that §3A1.1 requires a defendant to select a victim intentionally because of his vulnerability. In this case, the defendants "knew or should have known" that many claimants in their medical insurance scam were vulnerable because they had medical conditions which realistically precluded them from switching insurance companies, and they continued to accept these claimants' premium payments. The appellate court also rejected the defendants' assertion that the victims were not "unusually vulnerable" or "particularly susceptible" to the fraud. "Here, victims who developed medical conditions and could not get their claims paid are, as a group, unusually vulnerable to appellants' continued acceptance of premiums and appellants' promises of payment." The enhancement was affirmed.[17]

United States v. Veerapol, 312 F.3d 1128 (9th Cir. 2002), *cert. denied*, 538 U.S. 981 (2003). The district court's application of the vulnerable victim enhancement to the defendant who was convicted of holding another to involuntary servitude was not error, since the specific offense characteristics for the conviction did not provide an adjustment for victim characteristics such as immigrant status and the linguistic, educational, and cultural barriers that contributed to the victim remaining in involuntary servitude to the defendant.

United States v. Wetchie, 207 F.3d 632 (9th Cir. 2000). The district court did not err when it enhanced defendant's sentence under the vulnerable victim guideline because the victim was asleep at the time of the offense.

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002). The vulnerable victim enhancement does not apply if the factor that makes the victim vulnerable is not "unusual" for victims of the offense.

[17] The guideline was amended effective November 1, 1995, to delete language that suggested defendants must target their victims because of their vulnerability. *See* Appendix C, Amendment 521.

§3A1.2 Official Victim[18]

United States v. Alexander, 287 F.3d 811 (9th Cir. 2002). The (disbarred attorney) defendant appealed a three-level "official victim" enhancement under §3A1.2(a) because he threatened two members of the Montana Supreme Court Commission on Practice, which oversaw the defendant's disbarment. The defendant maintained that those two individuals were state employees and that the enhancement only applies to victims who are federal officials. The court first noted that §3A1.2(a) does not limit the term "government officer or employee" to federal officials and employees. Moreover, the individuals were clearly government officials at the time of the threats and thus the enhancement applied. Finally, the court ruled that it was not impermissible double counting to apply the enhancement even though §2A6.1 already incorporated the status of the victims in setting the offense level.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Berry, 258 F.3d 971 (9th Cir. 2001). The district court did not abuse its discretion in relying on the hearsay statements of codefendants to enhance the defendant's sentence under §3B1.1(a).

United States v. Gonzalez, 262 F.3d 867 (9th Cir. 2001). The defendant contended that application of enhancements under §§3B1.1(c) and 3B1.4 constituted impermissible double counting. Impermissible double counting occurs if a "guideline provision is used to increase punishment on account of a kind of harm already fully accounted for, though not when the same course of conduct results in two different types of harm or wrongs at two different times." *United States v. Calozza*, 125 F.3d 687, 691 (9th Cir. 1997). Here, each enhancement accounts for a different type of harm and thus there was no impermissible double counting: involving others in criminal wrongdoing is harmful without reference to age (§3B1.1(c) enhancement); use of a minor is harmful whether or not the defendant's role in the offense is that of a leader or organizer (§3B1.4 enhancement). Finally, §3B1.4 is not a lesser included offense of §3B1.1: the harm caused by the use of the minor is not fully accounted for by application of §3B1.1(c).

United States v. Jordan, 291 F.3d 1091 (9th Cir. 2002). The defendant challenged a four-level leadership role enhancement under §3B1.1(a). The court first ruled there was no error in the district court's findings that there were five or more members involved in the criminal activity or that the activity was extensive. The court ruled, however, that the government did not satisfy its burden of establishing that the defendant played a leadership role. The district court's

[18] An amendment effective November 1, 2004, restructures §3A1.2 (Official Victim) and provides a two-tiered adjustment with a three-level adjustment for offenses motivated by the status of the official victim and a six-level adjustment if the defendant's offense guideline was a Chapter Two, Part A (Offenses Against a Person).

reasons for finding to the contrary–the defendant's nephew's deference and the defendant's strong personality–were insufficient to support a role enhancement.

United States v. King, 257 F.3d 1013 (9th Cir. 2001), *cert. denied*, 539 U.S. 908 (2003). The defendant pled guilty to mail fraud, using a counterfeit postage meter stamp, and money laundering, stemming from a scheme where defendant mailed postcards informing individuals that they had won $10,000, required that they pay $15 in processing fees, then failed to award any money. The defendant appealed the four-level enhancement under §3B1.1(a), for being an organizer or leader of an activity involving at least five participants, arguing that because his workers were unaware of the scheme, they could not be considered participants. Citing Application Note 1 to §3B1.1, which excludes persons not criminally responsible for the offense from being participants, the court vacated the enhancement. It remanded so that the district court could determine the level of involvement of the defendant's ex-wife, whose participation might warrant the enhancement on grounds that the defendant would have been an organizer of a criminal activity that "was otherwise extensive." The court held that an enhancement on such grounds required the participation of at least one other criminally culpable individual.

United States v. Salcido-Corrales, 249 F.3d 1151 (9th Cir. 2001). The district court did not err in applying a two-level enhancement based on two equally adequate guideline provisions–defendant's aggravating role in the offense under §3B1.1, or the involvement of his 18-year-old son in the criminal enterprise under the §5K2.0 policy statement for circumstances that fall outside the "heartland" of the sentencing guidelines. The defendant was convicted of two counts of distribution of cocaine and was sentenced to a term of 64 months' imprisonment. The court held that the determination that the defendant was the "organizer, leader, manager, or supervisor" of a criminal enterprise that involved less that five people and was not otherwise extensive was not clearly erroneous. There was sufficient evidence to establish that the defendant "coordinated the distribution of drugs," "initiated drug deals with the undercover officer and negotiated the terms," and "exercised authority over his son and others." 249 F.3d at 1154-55. Furthermore, according to Application Note 2, it is sufficient that the defendant exercises control over *at least one* other person in order to qualify for the enhancement under §3B1.1(c). The court also upheld the district court's conclusion that the two-level departure was supported by §5K2.0, which allows a departure when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The district court did not abuse its discretion when it held that involving one's son in a criminal enterprise, in light of the confidential relationship between father and son, is one of such circumstances.

§3B1.2 Mitigating Role

United States v. Wilson, 392 F.3d 1055 (9th Cir. 2004). The defendant convicted of drug-related conspiracy offenses was not entitled to a "minor role" downward adjustment in his sentence where the defendant was involved in every aspect and at every level of the conspiracy.

United States v. Barajas, 360 F.3d 1037 (9th Cir. 2004). The district court did not clearly err in finding, for purposes of sentencing, that the defendant did not have a minor role in the offense of aiding and abetting the cultivation of marijuana, and thus was not entitled to a downward adjustment. The defendant presented no evidence that his role was minor, but instead testified that he had no role in offense, in that he was a gullible tomato picker who found himself in wrong place at wrong time.

United States v. Smith, 282 F.3d 758 (9th Cir. 2002). The defendant who traveled extensively to facilitate drug importation was not entitled to a "minor role" downward adjustment in his sentence.

United States v. Murillo, 255 F.3d 1169 (9th Cir. 2001). The district court did not err when it declined to reduce the defendant's sentence for being a minor or minimal participant where the evidence showed that the defendant was planning on making several stops and that defendant had acted as a drug courier several times before this incident.

United States v. Pizzichiello, 272 F.3d 1232 (9th Cir. 2001), *cert. denied*, 537 U.S. 852 (2002). The defendant who participated in disposing of the murder victim's body, had access to and withdrew money from the victim's account, spent some of the money on himself, and participated in the cover-up was not entitled to a "minor role" downward adjustment in his sentence.

United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001). The district court did not err when it refused to grant defendant a minor participant reduction. The defendant's participation was necessary to the success of the trip and he had confessed both that he was a paid guide in training and that he had made such trips previously.

United States v. Demers, 13 F.3d 1381 (9th Cir. 1994). The district court erred in holding that a defendant was not entitled to an adjustment for mitigating role pursuant to §3B1.2 as a matter of law based on the fact that the defendant was convicted of the single participant offense of possession with intent to distribute instead of the conspiracy with which he was originally charged. Pursuant to a clarifying amendment to the introductory commentary to Chapter Three of the *Guidelines Manual*, the determination of a defendant's role in the offense is to be made on the basis of all relevant conduct, and is not limited to the defendant's role in the offense of conviction. The circuit court remanded the case to the district court for a factual determination as to the relative seriousness of the offense to which the defendant pled guilty compared to his actual criminal conduct.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Peyton, 353 F.3d 1080 (9th Cir. 2003). A grand jury charged the defendant with falsely procuring American Express credit cards in the names of her fellow postal workers in order to obtain money, goods, services, or any other thing of value. The defendant

raised a challenge to the two-level enhancement for abuse of a position of trust. The Ninth Circuit noted that as a supervisor with the U.S. Postal Service, the defendant possessed managerial discretion to access a secured roster listing the names and social security numbers of postal employees so that she could authorize over-time. The defendant's position allowed her to use the personal information of her fellow postal employees to commit fraud in their names without being easily detected or observed. Based on these facts, the court held that the defendant occupied a position of trust with respect to the postal employees under §3B1.3.

United States v. Brickey, 289 F.3d 1144 (9th Cir. 2002). The defendant challenged a §3B1.3 abuse of position of trust enhancement, which was based on the fact that the defendant was an INS border inspector who received bribes in return for letting cars pass through the border without routine inspection. In that position, the defendant had "wide discretion in deciding whom to admit into the United States" and "had discretion in deciding what vehicles to check for contraband." The court concluded that, "[c]learly, such a position is one of public trust characterized by professional discretion."

United States v. Fontenot, 14 F.3d 1364 (9th Cir. 1994). A two-level adjustment in the defendant's base offense level for abusing a position of private trust in a manner that significantly facilitated the commission or concealment of offense was not justified for defendant who was convicted of traveling in interstate commerce with intent to hire a person to murder his wife; defendant's position of trust via marital relationship with his wife did not facilitate his travel or formation of his intent or concealment of offense.

United States v. Hoskins, 282 F.3d 772 (9th Cir. 2002). The defendant's security guard position was not a position of public or private trust.

United States v. Technic Services, Inc., 314 F.3d 1031 (9th Cir. 2002). The Ninth Circuit held that the secretary/treasurer of an asbestos remediation corporation did not abuse a position of public trust; could have used a "special skill" in his offense; and did occupy a position of private trust, which, if abused, would support an enhancement. The defendants, an asbestos remediation corporation (TSI) and its secretary/treasurer, were convicted at jury trial of various counts of violating the Clean Air and Water Acts. At sentencing, the district court applied a two-level enhancement for abuse of trust. The Ninth Circuit identified three separate avenues towards an enhancement pursuant to §3B1.3: abuse of public trust, use of a special skill, and abuse of private trust. With regard to public trust, the Ninth Circuit noted that the position of trust must be established from the position of the victim. Here, the public and the government were the victims. And, notwithstanding his government contract and his license to abate asbestos, the Ninth Circuit held that the secretary/treasurer was not in a position of trust with the government or the public and therefore the enhancement could not be supported on this ground. The Ninth Circuit also noted, however, that the license to abate asbestos would support a special skills enhancement (if the defendant had not already received an aggravating role enhancement), and that it is possible that the defendant abused a position of private trust with respect to his employees.

United States v. Liang, 362 F.3d 1200 (9th Cir. 2004). The defendant was a long-time gambler who was indicted, with his co-conspirators, on charges of conspiracy to participate in an enterprise through a pattern of racketeering by cheating. At sentencing, the government orally moved for a two- level sentence enhancement for the use of "special skills," pursuant to §3B1.3, arguing that the defendant had "extraordinary eyesight" that allowed him to peek at the cards in the shoe. The district court granted the enhancement. On appeal, the Ninth Circuit noted that the application note to §3B1.3 defines "special skill" as "a skill not possessed my members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts." The court concluded that a skill is only "special" for purposes of §3B1.3 if it is also a skill usually requiring substantial education, training or licensing, so the defendant's extraordinarily acute vision could not be described as a skill. Accordingly, the court vacated the defendant's sentence and remanded the case for re-sentencing.

United States v. Harper, 33 F.3d 1143 (9th Cir. 1994). The defendant's special knowledge of ATM machines and their service procedures did not involve the kind of education, training or licensing required to constitute a special skill under §3B1.3, comment. (n.2).

United States v. Lee, 296 F.3d 792 (9th Cir. 2002). The special skills enhancement does not apply to a defendant who used computer skills to facilitate sales over the Internet using a fraudulent website, but whose computer skills were not in the class of professionals ("pilots, lawyers, doctors, accountants, chemists, and demolition experts").

§3B1.4 Using a Minor to Commit a Crime

United States v. Jimenez, 300 F.3d 1166 (9th Cir. 2002). The Ninth Circuit held that the fact that defendant had her son with her when she crossed the U.S.-Mexico border with marijuana did not, by itself, warrant an enhancement for using a minor. The district court had found that the defendant had "in essence . . . recruited" her son to assist in avoiding detection at the border. The Ninth Circuit held that this finding was clearly erroneous, noting it was routine for the son to accompany his mother on trips to Mexico, that he was with his mother for the whole trip, and that she did not make a special trip to get him just to have him present for the crossing. As his mere presence in the car at the time of the offense was insufficient to support the enhancement, the Ninth Circuit held that the district court had erred in applying it.

United States v. Castro-Hernandez, 258 F.3d 1057 (9th Cir. 2001). The defendant appealed the district court's two-level upward adjustment, under §3B1.4, for use of a minor to assist in avoiding detection. He contending that the enhancement requires active involvement or employment of the child in the offense. When the defendant tried to drive marijuana over the border, he brought his son with him. The child was normally cared for by the defendant's mother-in-law during the workday. The district court concluded that the defendant used his son to try to conceal his offense. The appellate court affirmed, holding that the "minor's own participation in a federal crime is not a prerequisite to the application of §3B1.4. It is sufficient

that the defendant took affirmative steps to involve a minor in a manner that furthered or was intended to further the commission of the offense."

United States v. Gonzalez, 262 F.3d 867 (9th Cir. 2001). Application of the sentencing guideline providing for an enhancement for the use of a minor was not precluded by any lack of awareness on part of the defendant of the minor status of the person involved in the offense.

United States v. Parker, 241 F.3d 1114 (9th Cir. 2001). The district court erred when it increased defendant's sentence by two levels under §3B1.4 for using a minor to commit a crime. The appellate court held that, "in the absence of evidence that the defendant acted affirmatively to involve the minor in the robbery, beyond merely acting as his partner," "a defendant's participation in an armed bank robbery with a minor does not warrant a sentence enhancement."

Part C Obstruction

§3C1.1 Willfully Obstructing or Impeding Proceedings

United States v. Barajas, 360 F.3d 1037 (9th Cir. 2004). The district court did not clearly err in deciding that the defendant committed perjury, warranting an obstruction of justice adjustment in his offense level for aiding and abetting cultivation of marijuana. The district court found, given the fact that the defendant had lived in the area for more than 20 years and had worked as a tomato picker in the past, that his testimony that he followed strangers into a remote area of the foothills in the later part of the year merely to pick tomatoes was "almost outrageous." The district court further found that it was implausible that the defendant possessed a can of beer at a bar, maintained possession of it during his journey into the foothills, and that the can somehow ended up at the second site, 400 yards away. The Ninth Circuit found that the district court's finding that the Dunnigan elements were met "is plausible in light of the record viewed in its entirety" and held that the district court did not clearly err in adjusting the defendant's sentence upward two levels pursuant to section 3C1.1.

United States v. Alvarado-Guizar, 361 F.3d 597 (9th Cir. 2004). The district court declined to impose a two-level enhancement for obstruction of justice under §3C1.1 and refused to reduce his sentence for acceptance of responsibility or to grant a reduction of sentence under 18 U.S.C. § 3553's "safety valve" provision. The defendant timely appealed his convictions, and the government cross-appealed. The appellate court noted that the enhancement for obstruction of justice was not mandatory because the district court had not found all the factual predicates that supported a finding of perjury. The appellate court next considered whether the district court was required to make factual findings to support its decision not to impose a sentencing enhancement under §3C1.1. The requirement that a district court make factual findings that encompass all the elements of perjury "is a procedural safeguard designed to prevent punishing a defendant for exercising her constitutional right to testify." There is no parallel requiring the same result when a defendant is not receiving a longer sentence. Therefore, the Ninth Circuit affirmed the district court's decision.

United States v. DeGeorge, 380 F.3d 1203 (9th Cir. 2004). The defendant attempted to defraud an insurance company and committed perjury during the civil trial. He was then charged with mail fraud and wire fraud. During the criminal sentencing phase, the prosecutor requested a two-level enhancement for obstruction of justice under §3C1.1, arguing that failure to apply the enhancement would allow the defendant to unfairly benefit by eliminating any sentencing enhancements for his civil perjury. The district court applied a two-level enhancement for obstruction of justice. The appellate court reversed, holding that §3C1.1 requires that the perjury occur "during the course of the [criminal] investigation," and ruled that the perjury was not an "obstruction offense" for the purposes of the enhancement.

United States v. Fontenot, 14 F.3d 1364 (9th Cir.1994). The district court did not err in applying a two-level upward adjustment for obstruction of justice pursuant to §3C1.1 because the defendant refused to submit to psychiatric testing. The Ninth Circuit found this refusal to be material because the defendant asserted the defense of diminished capacity.

United States v. Hernandez-Ramirez, 254 F.3d 841 (9th Cir. 2001). Submitting a false financial affidavit to a magistrate judge for purposes of obtaining appointed counsel is sufficient to warrant a §3C1.1(B) two-level adjustment for obstruction of justice.

United States v. Hinostroza, 297 F.3d 924 (9th Cir. 2002). Adjustment for obstruction of justice based on defendant's testimony was appropriate where the district court found that the testimony was false and material to the sentencing determination.

United States v. Jimenez, 300 F.3d 1166 (9th Cir. 2002). The district court clearly erred in applying the obstruction of justice enhancement based on defendant's false testimony at trial because the district court did not expressly find that the false testimony was material.

United States v. Khang, 36 F.3d 77 (9th Cir. 1994). The court properly enhanced the defendants' sentence pursuant to §3C1.1 (Obstruction of Justice) when the defendants failed to adequately prove their assertion that they brought opium into the United States for their sick father in accordance with their Hmong culture. The obstruction was material, because it was made in an attempt to receive a downward departure.

United States v. Pizzichiello, 272 F.3d 1232 (9th Cir. 2001). The obstruction enhancement was properly applied because the state officials to whom the defendant directed his obstructive conduct were investigating the same robbery offense to which he later pled guilty in federal court.

United States v. Verdin, 243 F.3d 1174 (9th Cir. 2001). The district court properly enhanced the defendant's sentence for obstruction of justice based on his use of a false identity before the court.

§3C1.2 Reckless Endangerment During Flight

United States v. Franklin, 321 F.3d 1231 (9th Cir. 2003). As a matter of law, a defendant must do more than knowingly participate in an armed robbery in which getaway vehicles are part of the plan to warrant a reckless endangerment enhancement. The district court applied the enhancement even though the defendant was not in the car because the defendant had helped to plan the robbery and the plan included the use of getaway cars. Not every getaway escalates into reckless endangerment during flight, and that the conduct that recklessly endangers must be more than reasonably foreseeable to the defendant for the enhancement to apply. Rather, the government must prove that the defendant was responsible for or brought about the driver's conduct for the enhancement to apply. Because the government did not prove this, the Ninth Circuit remanded for resentencing without the enhancement.

United States v. Lopez-Garcia, 316 F.3d 967 (9th Cir. 2003). Imposition of two-level increase in the defendant's sentencing level for recklessly creating a substantial risk of serious bodily injury to another in the course of fleeing from law enforcement officers was not warranted for the defendant convicted of transporting illegal aliens, where the district court also increased the defendant's sentencing level, under the guideline authorizing an increase for recklessly creating a substantial risk of serious bodily injury to another while transporting illegal aliens, and such an increase was based solely on the defendant's conduct in fleeing from law enforcement officers.

United States v. Luna, 21 F.3d 874 (9th Cir. 1994). While fleeing the scene of an armed bank robbery, the defendants ran three stop signs, stopped the car in the middle of the road and when they were approached by a police officer, defendant Luna reached down to the floorboards (where a gun was later recovered). After the police officer retreated, the defendants accelerated, forcing the police officer to make chase, and then the defendants jumped out of the vehicle while it was still moving. The district court adjusted by two levels defendant Torres' offense level for reckless endangerment. Defendant Torres argued that the traffic violations did not amount to reckless endangerment and that Luna's movement towards the gun was merely preparatory and could not form the basis of a §3C1.2 enhancement. The circuit court concluded that the traffic violations did constitute a gross deviation from ordinary care because the conduct occurred in a residential area and created a substantial risk of serious bodily injury or death and declined to decide whether preparatory conduct to avoid arrest could constitute reckless endangerment.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts[19]

United States v. Butler, 389 F.3d 956 (9th Cir. 2004). An amendment to sentencing guidelines that required grouping of fraud and money laundering counts was a clarifying amendment that could be applied retroactively when sentencing the defendant for mail fraud and money laundering.

United States v. Alexander, 287 F.3d 811 (9th Cir. 2002). Grouping was warranted with respect to two of the defendant's five counts of conviction for interstate communication of threats to injure others that involved the same victim, but was not warranted with respect to the remaining three counts involving threats to different victims.

United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994). The defendant was convicted of felony murder and aggravated sexual abuse. The district court did not group the two offenses and the defendant received two concurrent life sentences. These two offenses constituted a single act, at essentially the same time, same place, against the same victim and with a single criminal purpose. Accordingly, the sentencing judge erred by not grouping these two offenses together pursuant to §3D1.2(a). The circuit court reversed and remanded the case.

United States v. Hines, 26 F.3d 1469 (9th Cir. 1994). The district court did not err when it determined that the defendant's two convictions were not "closely related" for grouping purposes under §3D1.2. The defendant pled guilty to threatening the President, in violation of 18 U.S.C. § 871 and to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He argued that the possession was a "count embodied" in a specific offense characteristic used to enhance his base offense level because the district court relied on his possession of the firearm to increase his sentence for conduct evidencing an intent to carry out the threat under §2A6.1. Although the circuit court found that the district court relied on the possession of the weapon to apply the §2A6.1(b)(1) enhancement, it held that the counts were not groupable. "[T]he conduct embodied in being a felon in possession of a firearm is not substantially identical to the specific offense characteristic of engaging in conduct evidencing an intent to carry out a threat against the President [since] [c]onduct evidencing an intent to carry out a threat may be manifested in many different ways."

United States v. Melchor-Zaragoza, 351 F.3d 925 (9th Cir. 2003). The indictment alleged that defendants conspired to kidnap 23 illegal aliens from a group of smugglers. The sentencing court divided the conspiracy conviction into separate count groups based on the number of victims under §1B1.2(d) and §3D1.2 and increased the combined offense level by five levels. The issue on appeal was whether a conspiracy to take several hostages should be treated

[19] An amendment effective November 1, 2004, adds §2G3.1 to the list of guidelines at §3D1.2(d) since these offenses typically are continuous and ongoing in nature; and adds §2X6.1 to list of offenses specifically excluded from being grouped under §3D1.2(d).

as separate "offenses" committed against separate victims for purposes of §§3D1.2 and 1B1.2. The Ninth Circuit held that where a conspiracy involves multiple victims, the defendant should be deemed to have conspired to commit an equal number of substantive offenses, and the conspiracy count should be divided under §3D1.2 into that same number of distinct crimes for sentencing purposes. In the instant case, the 23 victims who were held hostage suffered separate harms. Consequently, the district court did not err in treating the taking of each hostage as a separate offenses under §§3D1.2 and 1B1.2(d) and dividing the conspiracy conviction into 23 separate count groups.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility[20]

United States v. Wilson, 392 F.3d 1055 (9th Cir. 2004). The district court did not err in determining that defendant convicted of drug-related offenses had not clearly accepted responsibility for all of his relevant conduct and, thus, that he was not entitled to a downward adjustment in his sentence. The defendant went to trial on every single count charged in the indictment and contested essential elements of his guilt. The defendant's confessions were incomplete and vague, and he consistently tried to minimize his involvement in the conspiracy. The defendant outright denied conduct for which he was convicted, defendant offered trial testimony that the district court found not credible, and the defendant's attempts to help law enforcement were not motivated by sincere contrition, but were an attempt to secure immunity and to avoid taking responsibility for any of his conduct.

United States v. Rojas-Flores, 384 F.3d 775 (9th Cir. 2004). The district court erred when it denied granting a two-level reduction for acceptance of responsibility where the defendant disputed only the legal grounds for his conviction. The defendant was a prisoner found in possession of contraband and was sentenced to an additional 51-month sentence under 18 U.S.C. § 1791. The defendant went to trial where he admitted to the conduct, but argued the application of section 1791 to his conduct, a purely legal defense. The court ruled that arguing the legal basis of the offense of conviction does not amount to a denial of the conduct.

United States v. Blanco-Gallegos, 188 F.3d 1072 (9th Cir. 1999). The Ninth Circuit held that a defendant is entitled to the third-level reduction for acceptance of responsibility under §3E1.1(a) if (1) he qualifies for the initial two-level reduction under §3E1.1(a), and (2) he provides timely and complete information about the offense. Where, as here the defendant qualified for the initial reduction, and where his confession was immediate and complete, the fact that he later recanted his confession and went to trial does not alter this conclusion. The Ninth Circuit reversed the district court's decision denying the defendant the third level.

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[20] Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended this guideline by amending the criteria for the additional one level and incorporating language requiring a government motion.

United States v. Kimple, 27 F.3d 1409 (9th Cir. 1994). What constitutes "timely" acceptance of responsibility is both functional and temporal and is context specific; thus passage of time is not the only consideration in determining whether to grant the additional reduction.

United States v. Ochoa-Gaytan, 265 F.3d 837 (9th Cir. 2001). After conviction at trial, a defendant may still exhibit sufficient contrition to gain an adjustment under §3E1.1, and the district court should determine whether the defendant demonstrated contrition for his offense by considering the factors in Application Note 1.

United States v. McKinney, 15 F.3d 849 (9th Cir. 1994). Despite going to trial, the defendant was entitled to reduction for acceptance of responsibility even though he refused to implicate his co-conspirators; acceptance of responsibility focuses on the defendant's contrition for his own conduct, not on the conduct of others.

United States v. Stoops, 25 F.3d 820 (9th Cir. 1994). The district court erred in denying the defendant an additional one-level reduction under §3E1.1(b), when the defendant confessed to the crime three times on the day it was committed, even though the defendant challenged the admissibility of his confessions in a pretrial motion.

United States v. Cortes, 299 F.3d 1030 (9th Cir. 2002). The Ninth Circuit reiterated that a defendant may manifest his acceptance of responsibility in many ways other than a guilty plea–even where defendant contested factual guilt at trial. The court noted that a defendant who went to trial could satisfy every condition listed in Application Note 1 . In denying the defendant a two-level reduction for his acceptance of responsibility, the district court noted that the defendant had not merely raised a constitutional defense, but also contested factual guilt at trial. Because the Ninth Circuit could not tell from the record if the district court had *sub silentio* balanced all the relevant factors, or if the district court believed that the defendant was ineligible because he had contested his guilt at trial, the Ninth Circuit remanded for re-consideration.

United States v. Jeter, 236 F.3d 1032 (9th Cir. 2000). The district court erred by allowing only a one-level adjustment for acceptance of responsibility. The defendant was convicted of importation of marijuana and possession of marijuana with intent to distribute. Although the district court applied an upward adjustment for committing perjury during trial, it also allowed for a one-level adjustment after the defendant admitted to knowing about the marijuana. The Ninth Circuit held that the adjustment was erroneous and clearly at odds with the plain language of §3E1.1, which only allowed a two-level decrease for acceptance of responsibility. The court remanded for a reconsideration of the adjustment, especially in light of the fact that the obstruction of justice enhancement may preclude any downward adjustment at all.

United States v. Hicks, 217 F.3d 1038 (9th Cir. 2000). It is not plain error to deny an acceptance of responsibility reduction to a defendant who presents a thorough defense at trial, challenging the legal and factual validity of the government’s case.

United States v. Khang, 36 F.3d 77 (9th Cir. 1994). That defendants were found to have obstructed justice within the meaning of the sentencing guidelines by lying about their motive to commit the drug offense. It did not preclude a downward adjustment to their offense levels for acceptance of responsibility, where lies would not establish a defense to the crime or avoid criminal liability.

United States v. Sanchez Anaya, 143 F.3d 480 (9th Cir. 1998). The district court properly deducted levels for role in the offense prior to determining whether the defendant qualified for the additional offense level reduction for acceptance of responsibility. After the adjustment for minor role, the defendant's offense level was 14, which meant that he was entitled to no more than two levels for acceptance of responsibility. The guidelines instruct that the role points should be deducted before turning to the provision for acceptance of responsibility.

United States v. Wehr, 20 F.3d 1035 (9th Cir. 1994). The district court properly applied only the two-level reduction for acceptance of responsibility. The defendant challenged the extent of the adjustment on constitutional grounds. Casting his argument in equal protection terms, he averred that the Commission acted irrationally in treating offense levels 15 and below differently from offense levels of 16 and above by providing for different adjustment levels. Noting that criminals do not present a suspect class, the Ninth Circuit interpreted this argument as a due process claim subject only to rational basis review. The court of appeals upheld the proportionality scheme as constitutional. "[A] defendant who accepts responsibility for a more serious offense normally saves the government more trouble and expense"; thus, there is a rational basis for providing incentives to plea bargain to defendants with higher offense levels.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Govan, 152 F.3d 1088 (9th Cir. 1998). The defendant argued that the sentencing guidelines violated due process by providing for an elevated criminal history category based on juvenile and adult misdemeanor offenses. The court of appeals upheld the district court's calculation of the defendant's criminal history and rejected the defendant's contention that consideration of misdemeanor crimes with summary probation and limited jail time results in sentences that are not truly reflective of an individual's criminal background or future criminal behavior. The court of appeals noted that a sentence under the guidelines is highly individualized under historically accepted criteria, which includes the defendant's criminal history, the degree of seriousness of the crime, as well as a more or less refined categorization of criminal offenses. Moreover, a sentencing court is permitted under §4A1.3 to depart from a recommended sentence if it believes that a defendant's criminal history category significantly over-represents the seriousness of his criminal record or the likelihood that he will commit further crimes.

United States v. Mendoza-Morales, 347 F.3d 772 (9th Cir. 2003). On appeal, the defendant argued that the district court committed plain error in assigning five criminal history points for two of his prior state convictions. More specifically, the defendant argued that the district court erred when it considered his state court sentences as "sentences of imprisonment," because California law did not consider sentences imposing jail terms as conditions of probation to be "punishment." The Ninth Circuit noted that in deciding whether a prior state conviction should be counted for purposes of a federal criminal history calculation, a district court must examine federal law. In the instant case, the applicable federal law was clear: any "sentence of incarceration" imposed after an adjudication of guilt counted as a "sentence of imprisonment,"§4A1.2(b)(1), and incarceration as a condition of probation was treated in the same way as ordinary incarceration. The district court's sentence was affirmed.

United States v. Ramirez, 347 F.3d 792 (9th Cir. 2003). The defendant pled guilty to a Class A felony with a statutory minimum sentence of ten years. At sentencing, the district court found that the defendant's prior temporary detentions, which were ordered by the YOPB as a result of alleged parole violations, were neither prior sentences under §4A1.1(c) nor terms of imprisonment imposed as a result of a revocation of parole that could be aggregated with the defendant's juvenile sentence under §4A1.2(k). As a result, the district court determined that the defendant had no criminal history points and was eligible for a "safety valve" departure from the mandatory minimum under §5C1.2. The government appealed, arguing that the detentions constituted constructive parole revocations that could be aggregated with the defendant's juvenile sentence of imprisonment. The Ninth Circuit noted that the district court determined that the proceedings underlying the temporary detentions were not "adjudications of guilt." Consequently, the appellate court agreed with the district court that neither could be viewed as "prior sentences" for the purpose of increasing defendant's criminal history score.

United States v. Ramirez-Sanchez, 338 F.3d 977 (9th Cir. 2003). The defendant was convicted of illegally reentering the United States following his deportation. At sentencing, the district court found that defendant was under a criminal justice sentence at the time of this offense, and applied two additional criminal history points pursuant to §4A1.1(d). On appeal, the defendant argued that, although he was sentenced to a term of "probation," he was immediately deported and never placed on any form of supervision. Therefore, the defendant claimed that his probationary period did not fall within the defined meaning of a "criminal justice sentence" under §4A1.1(d). The Ninth Circuit noted that the plain meaning of the guideline stated that a two point enhancement was appropriate where a defendant has committed the instant offense while under "any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." *See* §4A1.1(d). Although Note 4 indicated that a "criminal justice sentence" was one having a custodial or supervisory component, it also made clear that active supervision was not required for this item to apply. The court held that deportation did not terminate probation and the criminal history points were properly counted.

United States v. Reyes-Pacheco, 248 F.3d 942 (9th Cir. 2001). The defendant pled guilty to 8 U.S.C.A. § 1326, which criminalizes attempting to enter, entering, or being found in the United States after deportation for a prior offense. The defendant re-entered the country in 1996,

while he was on parole. Police arrested him in 2000 for being found in the country. The district court raised defendant's criminal history level under §4A1.1(d) and (e) for being on parole and for having committed the offense within two years of release from prison. In February 2000, when the defendant was arrested, however, he was no longer on parole and more than two years had passed since he had been released from prison. As such, the defendant argued that he had been sentenced for the wrong crime because he was guilty of being "found in" the country in February 2000, not of "entering" the country in April 1996. Affirming the sentence, the court held that because being "found in" the country after deportation is a continuing offense, starting from the time one enters the country until the time the person is arrested, the district court appropriately applied §4A1.1(d) and (e), based on the 1996 date when he entered the country while still on parole and within two years of release from prison.

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Donaghe, 50 F.3d 608 (9th Cir. 1995). The district court erred in departing upward on grounds that the defendant's criminal history category inadequately reflected his past criminal conduct, where the defendant was convicted more than 15 years earlier of several child molestation crimes. The government argued that the defendant's prior convictions were "similar" to his instant offense of falsifying a passport application because the defendant was motivated to falsify the passport application in order to escape investigation into new child molestation charges. The circuit court rejected this argument, holding that the causal link between the defendant's tendency to molest children and the false application did not make the two crimes "similar" for purposes of §4A1.2 commentary. The district court, on resentencing, "must explain the extent of its departure by analogizing the increased criminal history category or offense level to the next relevant category or offense level."

United States v. Garcia-Gomez, 380 F.3d 1167 (9th Cir. 2004). The defendant's early release did not operate to "suspend" the remainder of his sentence for purposes of criminal history calculation. The defining characteristic of a suspended sentence, which would not be calculated as part of the defendant's criminal history, is that it is suspended by a judicial officer, rather than an executive agency.

United States v. Hayden, 255 F.3d 768 (9th Cir. 2001). In 1993, the defendant was convicted of conspiracy to distribute cocaine and heroin and was sentenced pursuant to a plea agreement which stipulated to, among other things, a criminal history category of III. In 1998, the defendant petitioned to have two prior felony convictions from 1987 and 1990 set aside. After these petitions were granted, defendant filed a habeas petition requesting a recalculation of his 1993 sentence because the criminal history calculation counted convictions that were set aside. Under §4A1.2(j), sentences for expunged convictions should not be counted in the criminal history calculation. Application Note 10 to §4A1.2 differentiates between convictions that are "set aside" and those that are "expunged," concluding that sentences resulting from convictions which were *set aside can* be counted, while *expunged* convictions cannot be counted. After reviewing California law, the court concluded that it provided for a "set aside" procedure, but does not expunge the conviction.

United States v. Pearson, 312 F.3d 1287 (9th Cir. 2002). Where a defendant's prior sentence would have extended into the relevant time period to be counted as criminal history had the defendant not escaped from prison, the sentence should be counted.

United States v. Ramirez-Sanchez, 338 F.3d 977 (9th Cir. 2003). The district court properly assessed one criminal history point pursuant to §4A1.2(c)(1) for the offense of "driving without an operator's license in possession."

United States v. Sandoval, 152 F.3d 1190 (9th Cir. 1998). The district court did not err in counting a prior conviction for petty theft for the purpose of computing the defendant's criminal history score.

United States v. Sandoval-Venegas, 292 F.3d 1101 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 2430 (2004). The defendant was sentenced as a career offender on the basis of two prior convictions: one for possessing marijuana for sale, and one for burglary. The district court erred in construing a prior burglary conviction as a qualifying offense on the basis of documents that did not clearly indicate the offense of conviction. Even though the defendant had not objected in district court to the use of the burglary conviction as a qualifying offense, the Ninth Circuit found plain error and vacated the sentence.

United States v. Semsak, 336 F.3d 1123 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1161 (2004). The defendant pled guilty to involuntary manslaughter. The district court departed upward by four levels because the size of the defendant's truck and the recklessness of the defendant's driving took the case outside the heartland of the offense guideline. On appeal, the defendant challenged the district court's upward departure. The appellate court stated that in assessing the district court's authority to depart upward, it must determine whether the bases for departure were already taken into account by the offense guideline, noting that even a factor accounted for by the guideline may justify an upward departure if it was present to an exceptional degree or in some other way made the case different from the ordinary case. The court concluded that the district court's recounting of defendant's extreme recklessness supported both the decision to depart and the extent of the departure. The court held that when it compared the facts of the instant case to other reckless driving cases, it did not find the four-level enhancement excessive and therefore affirmed the sentence.

United States v. Shumate, 329 F.3d 1026 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1118 (2004). The district court determined that a conviction for delivery of marijuana for consideration under Oregon law is a controlled substance offense despite the fact that the statute includes mere solicitation of delivery of marijuana. The Ninth Circuit agreed, holding that solicitation is within the guidelines' definition of a controlled substance offense. In reaching this conclusion, the Court looked to Application Note 1 to §4B1.2, which states that "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses," and held that the word "include" renders that list non-exhaustive.

§4A1.3 Adequacy of Criminal History Category (Policy Statement)

United States v. Bad Marriage, 392 F.3d 1103 (9th Cir. 2004). An upward departure under sentencing guideline for departures for inadequacy of criminal history category, based on the seriousness of a defendant's past conduct, was improper. Prior convictions for assault, burglary and violation of a no-contact order resulted in sentences of 37 days or less, which did not make his criminal history so unusual as to distinguish him from other defendants in his category, and though the defendant did have an extensive criminal record, the defendant neither attempted to make a living off of crime or escalated his crimes, but rather was an individual ravaged by substance abuse.

United States v. Martin, 278 F.3d 988 (9th Cir. 2002). The district court did not abuse its discretion in horizontally departing upward because the defendant's criminal history category did not adequately reflect his criminal history. The district court also departed upward two offense levels based on the defendant's likelihood of future recidivism. That departure was improper because "the likelihood of future recidivism is encouraged as a factor to be considered in assessing whether a criminal history score is inaccurate, not in departing from an offense level."

United States v. Donaghe, 50 F.3d 608 (9th Cir. 1995). The district court erred in departing upward on grounds that the defendant's criminal history category did not adequately reflect the likelihood that he would commit other crimes based on a 1968 psychiatric evaluation which diagnosed the defendant as a homosexual deviant. The circuit court, reasoning that homosexuality is not an indicator of a defendant's propensity to commit crimes, ruled that homosexuality cannot be used as a departure factor.

United States v. Rodriguez-Martinez, 25 F.3d 797 (9th Cir. 1994). The defendant's offense carried a 120-month minimum sentence because he had a prior drug conviction. The district court sentenced the defendant to 136 months, stating that a sentence above the statutory minimum was warranted because the defendant had a recidivist nature and had committed his crime while on pretrial release. On appeal, the Ninth Circuit determined that the district court did not follow the appropriate procedure for departing upward from the statutory minimum. Accordingly, the court vacated the sentence and remanded for sentencing, instructing the district court to determine the defendant's offense level and appropriate criminal history category and any departures from that criminal history category, just as it would in an ordinary case.

United States v. Atondo-Santos, 385 F.3d 1199 (9th Cir. 2004). A downward departure under the sentencing guidelines based on first-time offender status is not warranted, since the guidelines already take that factor into account.

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002). Because the guidelines take into account a defendant's low likelihood of recidivism by creating a lower sentencing range under Criminal History Category I, the district court is forbidden from departing downward based upon a low likelihood of recidivism.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Carr, 56 F.3d 38 (9th Cir. 1995). The defendant was convicted of possession with intent to distribute 66.92 grams of cocaine base. Because he had two prior felony controlled substance offenses for relatively small quantities of drugs, he qualified as a career offender and was sentenced to 262 months' imprisonment. On appeal, the defendant challenged his sentence on the grounds that it violated the Eighth Amendment's Cruel and Unusual Punishment Clause and the Fifth Amendment's Due Process Clause. The circuit court concluded that the defendant's sentence was not so disproportionate to the gravity of his offenses as to violate the Eighth Amendment. The court also rejected the defendant's contention that §4B1.1 violates due process.

United States v. Garcia-Cruz, 40 F.3d 986 (9th Cir. 1994). The defendant was convicted in December 1988 as a felon in possession of a firearm. The sentencing court treated this as a crime of violence under the Armed Career Criminal Act, and originally sentenced him to a 200-month sentence. After the defendant prevailed on appeal and the case was remanded for resentencing, the parties disagreed over which version of the Guidelines Manual should apply. The government asserted that the defendant should be sentenced under the 1992 version of §2K2.1 in effect at resentencing, or as a career offender under the 1988 version of §4B1.1 in effect at the time of the offense. The district court disagreed and applied the guidelines it deemed most favorable to the defendant. The court then sentenced the defendant to 41 months' imprisonment under the 1990 guidelines in effect at the time of the original sentencing. The defendant appealed this sentence, asserting that he should have been sentenced under the 1988 guidelines with amendments to §4B1.1 applied retroactively. The Ninth Circuit agreed, holding that the amendments clarified that the offense of being a felon in possession of a firearm was not a crime of violence for purposes of §4B1.1 and guideline commentary must be given controlling weight. Accordingly, the court remanded, instructing the court to resentence under the 1988 Guidelines Manual.

United States v. Granbois, 376 F.3d 993 (9th Cir. 2004). The defendant argued that his 1998 conviction under 18 U.S.C. § 2244(a)(3) for abusive sexual contact with a child between the ages of 12 and 15 is not a "crime of violence" thus he is not a "career offender" under §4B1.1. The Ninth Circuit previously held in *United States v. Pereira-Salmeron*, 337 F.3d 1148 (9th Cir. 2003), that a similar offense for sexual abuse of a minor constituted a "crime of violence" under §2.L1.2 regardless of whether the threatened use of force against the person of another is an element of the offense. Adopting the same logic, the court in *Granbois* held that an offense constituting sexual abuse of a minor is considered a "forcible sex offense" and "crime of violence" under §4B1.1 and the defendant qualified as a career offender.

United States v. Quintana-Quintana, 383 F.3d 1052 (9th Cir. 2004). The defendant was convicted of being a deported alien found in the United States. His sentence was affirmed on

appeal. In a petition for rehearing and rehearing en banc, the defendant argued that *Blakely v. Washington*, 124 S. Ct. 2531 (2004), requires that his sentence be vacated because his prior conviction was not proved to a jury beyond a reasonable doubt and resulted in an unconstitutional 16-point enhancement under §2L1.2. The court denied the defendant's petition for rehearing, reasoning that the defendant's argument was foreclosed by the express terms of *Blakely* which preserved the exception that facts of prior convictions do not require submission to a jury and proof beyond a reasonable doubt.

§4B1.2 Definitions of Terms Used in Section 4B1.1

United States v. Sandoval, 107 Fed. Appx. 149 (9th Cir. 2004). Under the modified categorical approach, the information, plea agreement, and judgment in the record do not exclude the possibility that the defendant's guilty plea to third-degree assault was for conduct that did not involve substantial physical force and did not seriously risk physical injury.

United States v. Asberry, 394 F.3d 712 (9th Cir. 2004). Prior felony conviction of the defendant on charge of rape in the third degree under Oregon law, for having sexual contact with a girl less than 16 years of age and several years his junior, was "crime of violence" for purpose of the career offender guideline, since the commentary to the guideline mentioned that statutory rape met the definition of "crime of violence," and the nature of the conduct described in the statute of conviction generally posed a serious potential risk of physical injury to victim.

United States v. Heim, 15 F.3d 830 (9th Cir. 1994). The district court sentenced the defendant as a career offender pursuant to §§4B1.1 and 4B1.2. The defendant challenged the district court's application of the career offender guidelines on the grounds that the Sentencing Commission exceeded its statutory authority under 28 U.S.C. § 994(h) by including conspiracy within the definition of "controlled substance offense." The court of appeals held that the Commission did not exceed its statutory authority by including conspiracy within the definition of "controlled substance offense."

United States v. Sandoval-Venegas, 292 F.3d 1101 (9th Cir. 2002). To determine if a defendant qualifies as a career offender under §§ 4B1.1 and 4B1.2, documentation must establish that the defendant was convicted either under a categorically qualifying statute or for conduct sufficient to be a qualifying offense. The categorical approach analyzes the fact of conviction under a particular statute. The latter analysis, however, requires documentation that consists of judicially noticeable qualifying facts; that is, the documentation must show that the defendant was in fact guilty of each necessary element. In the instant case, one of the predicate offenses as defined in §4B1.2(b) did not satisfy the categorical approach test, and the record did not contain sufficient documentation to establish judicially noticeable, case-specific facts establishing that the defendant was convicted of a crime of violence. Accordingly, the court vacated the sentence and remanded for resentencing.

United States v. Wenner, 351 F.3d 969 (9th Cir. 2003). The defendant pled guilty to being a felon in possession of a firearm. The defendant argued that his state convictions for residential burglary and attempted residential burglary were not crimes of violence under §4B1.2(a)(2). The court of appeals agreed that the Washington residential burglary statute did not meet the definition of "burglary of a dwelling" under §4B1.2(a)(2), holding that the scope of the Washington statute exceeded the federal definition. Because the residential burglary was not a crime of violence under §4B1.2(a)(2), the defendant's state conviction for attempted residential burglary also was not a crime of violence.

§4B1.4 Armed Career Criminal

United States v. Smith, 387 F.3d 826 (9th Cir. 2004). Burglary is a violent felony under the Armed Career Criminal Act (ACCA) where there is unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.

United States v. Matthews, 278 F.3d 880 (9th Cir. 2002) (en banc). The district court erred in sentencing the defendant as an armed career criminal because the district court failed to analyze the statutes under which the defendant was previously convicted to determine whether they satisfied the elements of burglary under the *Taylor* categorical approach.

United States v. Phillips, 149 F.3d 1026 (9th Cir. 1998). The district court erred in failing to sentence the defendant as an armed career criminal. The district court had ruled that two burglaries committed by the defendant on October 21 and October 22, 1981, were not committed on occasions different from one another, for purposes of the Armed Career Criminal Act (ACCA). The court of appeals held that the burglaries were "temporally distinct" and therefore qualified as predicate offenses for the ACCA.

United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001). Under *Apprendi*, the Armed Career Criminal Act remains constitutional, because prior convictions that increase a statutory penalty do not have to be charged in the indictment or proven beyond a reasonable doubt. This "prior conviction" exception to *Apprendi* does not, however, include juvenile adjudications if those proceedings did not afford a jury trial and proof beyond a reasonable doubt.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentence in Certain Cases

United States v. Contreras, 136 F.3d 1245 (9th Cir. 1998). The Ninth Circuit held that the term "the government," as used in the provision of the safety valve statute (§5C1.2(5)), refers

to the prosecuting attorney. The appellate court rejected the defendant's argument that his disclosures to his probation officer qualified him for a safety valve sentence reduction.

United States v. Franco-Lopez, 312 F.3d 984 (9th Cir. 2002). The defendant entered into a plea agreement in which the government promised to recommend application of the safety valve if the probation office found that he met the requirement of §5C1.2 and the government agreed that the defendant had truthfully disclosed information and evidence of his involvement. The government then recommended to the probation office that the defendant receive an upward adjustment for aggravating role. The defendant complained that this recommendation was a breach of the plea agreement because any defendant found to have played an aggravating role is ineligible for the safety valve. The Ninth Circuit held that the conditional promise in the plea agreement to recommend the safety valve reduction was rendered a nullity if the government was permitted to take the position before the probation office that the defendant was ineligible.

United States v. Miller, 151 F.3d 957 (9th Cir. 1998), *cert. denied*, 525 U.S. 1127 (1999). The district court found that the defendant did not qualify for the safety valve because he failed to disclose all he knew about relevant conduct that was part of the same course of conduct or common scheme as the offense for which he was convicted. The defendant argued that use of the term "offense or offenses" in the safety valve statute limits the disclosure required to the offense of conviction. The court of appeals disagreed, reasoning that 18 U.S.C. § 3553(f)(5) requires disclosure "concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan," and thus plainly includes uncharged related conduct. Accordingly, a defendant who does not disclose all information he has concerning relevant conduct that is a part of the same course of conduct or common scheme of which he was convicted is not entitled to safety valve relief.

United States v. Valencia-Andrade, 72 F.3d 770 (9th Cir. 1995). The district court ruled that it lacked the authority, under the safety valve, to impose a sentence below the mandatory minimum, notwithstanding its finding that the defendant's criminal history category was over-represented. The defendant's prior criminal history consisted solely of two convictions for driving with a suspended license which resulted in two criminal history points, placing the defendant in Criminal History Category II. The circuit court held that 18 U.S.C. § 3553(f)(1) expressly precludes a downward departure from the mandatory minimum if the defendant has more than one criminal history point. The circuit court stated "where the criminal history category over-represents the seriousness of a defendant's prior criminal history, only Congress can provide a remedy."

Part D Supervised Release

§5D1.1 Supervised Release

United States v. Soto-Olivas, 44 F.3d 788 (9th Cir.), *cert. denied*, 515 U.S. 1127 (1995). The Ninth Circuit ruled that the defendant's rights under the Double Jeopardy Clause were not

violated by his prosecution for illegally reentering the United States, even though this reentry resulted in revocation of his term of supervised release imposed as punishment for an earlier offense. The defendant argued that revocation of supervised release constitutes double jeopardy because, unlike parole or probation revocation, revocation of supervised release constitutes punishment for the act which causes the revocation, not the original crime. The circuit court disagreed, reasoning that the plain language of the supervised release statute states that supervised release, although imposed in addition to incarceration, is still considered "a part of the sentence." 18 U.S.C. § 3583(a). Thus, the circuit court ruled that revocation of the defendant's's supervised release did not violate the double jeopardy clause because his entire sentence, including the period of supervised release, was punishment for the original crime.

§5D1.2 Term of Supervised Release[21]

United States v. Sanchez-Barragan, 263 F.3d 919 (9th Cir. 2001). USSG §5D1.2 does not restrict the maximum term of supervised release permitted under 21 U.S.C. § 841(b)(1)(C).

§5D1.3 Conditions of Supervised Release

United States v. Wise, 391 F.3d 1027 (9th Cir. 2004). The mere fact that the condition of supervised release imposed on the defendant, that she have no contact with children under 18 years of age, was unrelated to her offense of attempting to defraud the Social Security Administration was not of itself a sound reason to vacate condition; but the district court should not have imposed the condition with no prior notice to the defendant or her counsel that the district court was contemplating such a condition.

United States v. Hugs, 384 F.3d 762 (9th Cir. 2004). A condition of supervised release which required the defendant to "cooperate in the collection of DNA as directed by the U.S. probation officer" was not impermissibly vague in violation of due process clause.

United States v. Eyler, 67 F.3d 1386 (9th Cir. 1995). The district court conditioned the defendant's supervised release on the repayment of the attorney's fees paid to his court-appointed counsel under the Criminal Justice Act. The Ninth Circuit ruled that the district court's order that the defendant repay defense costs exceeded the district court's authority under 18 U.S.C. § 3583(d). The circuit court noted that conditions of supervised release must be "reasonably related" to the "goals of rehabilitation, deterrence, protection of the public, and training or treatment." The recoupment order failed to meet this mandatory requirement, and thereby violated the statute.

[21] An amendment effective November 1, 2004, conformed §5D1.2 (Terms of Supervised Release) to be consistent with changes in the PROTECT Act to terms of supervised release under 18 U.S.C. § 3583 for sex offenders.

United States v. Gallaher, 275 F.3d 784 (9th Cir. 2001). Citing §5D1.3(b)(2), the defendant argued that a condition of his supervised release prohibiting his possession of bows, arrows, or crossbows involved a greater deprivation of liberty than is reasonably necessary. Reviewing for an abuse of discretion, the court noted the defendant's history of violence and his ability to hunt with bows and determined that the district court did not abuse its discretion in imposing the prohibition.

United States v. Lopez, 258 F.3d 1053 (9th Cir. 2001), *cert. denied*, 535 U.S. 962 (2002). The defendant challenged the district court's order that he participate in a mental health program as a condition of supervision. Because the record amply supports the district court's order, it did not abuse its discretion.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Dubose, 146 F.3d 1141 (9th Cir. 1998). The defendants were convicted of a church arson which resulted in $121,403 in damages. They contended that restitution orders, requiring full compensation in the amount of the victim's loss were grossly disproportionate to the crime committed and violated the Eighth Amendment's proscription against excessive fines. They also argued that the imposition of a restitution obligation enforceable through a civil action for 20 years after their release from prison was cruel and unusual punishment. The court rejected both arguments. The court reasoned that the full amount of restitution is inherently linked to the culpability of the defendant; the victim is limited to the recovery of specified losses, and restitution is ordered only after adjudication of guilt. Moreover, the district court has the discretion to impose a nominal payment schedule, and the defendant is not subject to resentencing for nonpayment unless he did not make bona fide efforts to pay.

United States v. King, 257 F.3d 1013 (9th Cir. 2001), *cert. denied*, 539 U.S. 908 (2003). The defendant pled guilty to mail fraud, using a counterfeit postage meter stamp, and money laundering. The defendant challenged the restitution amount ordered, arguing that it was excessive. The appellate court rejected the defendant's argument that the district court should have reduced the restitution by the amount of a previous restitution that the defendant was court ordered to pay to the post office. The appellate court also determined that the district court had adequately considered the defendant's ability to pay the restitution when it calculated the amount and that the record satisfied the relatively lenient standard for determining a defendant's ability to pay, *i.e.*, "some evidence the defendant may be able to pay."

United States v. Najjor, 255 F.3d 979 (9th Cir. 2001). The district court accepted the probation office's restitution calculation despite being unsatisfied with the probation office's calculation. The appellate court held that "the district court should not accept uncritically an amount recommended by the probation office." Accordingly, the court remanded so that the district court could make an independent finding of the victim's loss.

United States v. Reed, 80 F.3d 1419 (9th Cir. 1996). The defendant could not be sentenced to pay restitution under the Victim and Witness Protection Act for damage caused to vehicles while the defendant was fleeing police.

United States v. Riley, 143 F.3d 1289 (9th Cir. 1998). Under the Victim and Witness Protection Act, a defendant can only be ordered to pay restitution for conduct that was part of the scheme, conspiracy, or pattern of criminal activity and the defendant's auto loan was not part of the tax fraud scheme of which he was convicted.

United States v. Stoddard, 150 F.3d 1140 (9th Cir. 1998). Restitution can only include losses directly resulting from a defendant's offense; consequential expenses may not be legally included in an order of restitution.

§5E1.2 Fines for Individual Defendants

United States v. Brickey, 289 F.3d 1144 (9th Cir. 2002). The district court ordered defendant to pay a fine within the applicable guideline range per §5E1.2(c)(3). The defendant appealed. The appellate court held that the defendant has the burden of proving that he cannot afford to pay a fine. The uncontroverted evidence established that the defendant had the assets to pay the fine and had numerous skills which could be reasonably expected to generate a good income. The defendant refused to discuss his finances with the probation officer and thus failed to demonstrate that he could not pay the fine. *See also United States v. Robinson*, 20 F.3d 1030 (9th Cir. 1994) (The district court erred in failing to determine at the time of sentencing the defendants' future ability to pay the fine imposed and imposing as an alternative a period of community service).

United States v. Gray, 31 F.3d 1443 (9th Cir. 1994). The district court departed upward from a fine range of $3,000-$30,000 to $250,000. The defendant appealed. The court of appeals held that the district court had authority to depart from the fine range. Nevertheless, the court vacated the sentence and remanded because the district court failed to (1) make a finding as to whether the aggravating circumstances prompting the departure were taken into consideration by the Sentencing Commission, and (2) address how or why it arrived at the fine amount.

Part G Implementing The Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Buckland, 289 F.3d 558 (9th Cir. 2002) (en banc). Where the guideline range sentence for multiple counts of convictions exceeds the statutory maximum for those convictions, §5G1.2(d) requires consecutive sentences to achieve the total punishment calculated by the guidelines.

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002). The district court imposed consecutive sentences for separate counts involving different victims (and concurrent sentences for the counts involving the same victims). The defendant argued that he lacked notice of the district court's intention to impose consecutive sentences. Because there was no notice that consecutive sentences were being considered as a departure from the guidelines, the court vacated the sentence and remanded for resentencing.

§5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

United States v. Chea, 231 F.3d 531 (9th Cir. 2000). A jury convicted the defendant of conspiracy and armed robbery, in violation of 18 U.S.C. §§ 1951(a) and 924(c). With no mention of §5G1.3, the district court sentenced defendant without considering a 116-month sentence the defendant was serving for a state armed robbery conviction. The defendant argued that the district court should have considered his current state conviction, and the court of appeals agreed. The district court was required to consider the defendant's undischarged term of imprisonment, and the court vacated the sentence and remanded for such consideration.

United States v. Garrett, 56 F.3d 1207 (9th Cir. 1995). The district court erred in failing to properly consider the commentary methodology of §5G1.3(C) or to explain its reasons for using an alternative methodology in sentencing the defendant.

United States v. Kikuyama, 150 F.3d 1210 (9th Cir. 1998). The district court acted within its discretion in imposing consecutive sentences of 12 months' incarceration for violation of supervised release and 46 months' incarceration for bank robbery where the court cited three factors that weighed in favor of imposing consecutive sentences: the defendant's previous adjudications on several occasions as a juvenile, defendant's prior manslaughter conviction, and defendant's escalating criminal behavior.

United States v. King, 257 F.3d 1013 (9th Cir. 2001). The appellate court affirmed the district court's decision when it declined to impose concurrent sentences based on a commonality between the convictions, but remanded so that the district court could determine, under §5G1.3(c) of the 1994 guidelines, to what extent the sentences should be run concurrent.

United States v. Redman, 35 F.3d 437 (9th Cir. 1994). The district court did not err in imposing upon the defendant an 18-month sentence to run consecutive to his 36-month state term of imprisonment.

United States v. Scarano, 76 F.3d 1471 (9th Cir. 1996). The court did not err in imposing consecutive sentences upon defendant convicted of two counts of mail fraud despite the fact that one offense was pre-guidelines and one offense was post-guidelines.

United States v. Steffen, 251 F.3d 1273 (9th Cir. 2001). The district court did not err when imposing a consecutive sentence upon a defendant convicted of wire fraud and travel fraud who was serving time for escape, pursuant to §§5G1.3 and 7B1.3(f).

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002). The district court must give the defendant notice of intent to impose, and grounds for imposing, consecutive sentences where consecutive terms were not indicated by the guidelines.

Part H Specific Offender Characteristics

§5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)[22]

United States v. Leon, 341 F.3d 928 (9th Cir. 2003). The defendant was convicted of preparing false income tax returns. At sentencing, the district court departed downward six levels based on defendant's indispensable role in caring for his wife, who recently had her kidney removed due to renal cancer and who had been diagnosed as being at risk of committing suicide if she were to lose her husband to death or incarceration. The court of appeals affirmed the departure, concluding that the district court properly placed special emphasis on the wife's poor emotional and physical health and the fact that defendant was the only person available to tend to her needs. Although the government argued that reliance on the wife's suicidal feelings would cause virtually every defendant to claim that he or she had a family member who might commit suicide upon such defendant's incarceration, the court of appeals found that defendant's wife's documented history of depression was significant.

§5H1.12 Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

United States v. Burrows, 36 F.3d 875 (9th Cir. 1994). The government conceded that the district court erred in retroactively applying §5H1.12, which prohibits downward departures for youthful lack of guidance, to the defendant's sentence. The circuit court concluded that while the promulgation of §5H1.12 in 1992 "wiped out" the availability of this departure in subsequent cases, the departure was available to this defendant, because retroactive application of the guideline violated the *ex post facto* clause. The case was remanded for the district court to consider whether the departure was warranted for this defendant.

[22] Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended this departure factor by adding language that prohibits this departure in child crimes and sexual offenses.

Part K Departures

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Auld, 321 F.3d 861 (9th Cir. 2003). The defendant was convicted of three counts of possession with intent to distribute drugs. The base mandatory minimum sentence was 10 years, but because the government filed a special information alleging a prior felony drug conviction, the mandatory minimum sentence was increased to 20 years. The defendant cooperated with the government and the government moved for a downward departure from 20 years to 15 years. The defendant argued that, as his guideline range without consideration of the mandatory minimum was 121 to 151 months, any departure should be from that range. The district court disagreed the government's position and imposed a sentence of 15 years. On appeal, the Ninth Circuit joined the Third, Fourth, Sixth, Seventh, and Eleventh Circuits in holding that the appropriate point of departure pursuant to §5K1.1 is the statutorily required mandatory minimum sentence, rather than the lower otherwise applicable guideline range.

United States v. Emery, 34 F.3d 911 (9th Cir. 1994). The defendant argued that he was entitled to a substantial assistance downward departure because he assisted the state in a drug conspiracy investigation when he agreed to withdraw his motion to unseal the search warrant. The circuit court held that the district court correctly determined that it lacked the authority to depart because the government failed to file a substantial assistance motion. The circuit court noted, however, that the government may have been under the mistaken impression that a §5K1.1 recommendation was unavailable because the assistance was provided to the state authorities. Accordingly, the circuit court instructed the United States Attorney's office to re-examine whether such a recommendation was warranted.

United States v. Leonti, 326 F.3d 1111 (9th Cir. 2003). Right to effective assistance of counsel attaches to defendant's presentence attempts to cooperate with the government to obtain a downward departure for substantial assistance.

United States v. Quach, 302 F.3d 1096 (9th Cir. 2002). Because the terms of the plea agreement obligated the government to move for a §5K1.1 departure if the defendant had been fully cooperative and provided substantial assistance, the government was required to make a good faith evaluation at the time of sentencing whether the defendant had done so.

United States v. Treleaven, 35 F.3d 458 (9th Cir. 1994). The district court had the authority to grant a downward departure for substantial assistance in the absence of a government motion where the refusal to file the motion was based on an unconstitutional motive.

§5K2.0 Grounds for Departure (Policy Statement)[23]

Downward Departures

United States v. Tzoc-Sierra, 387 F.3d 978 (9th Cir. 2004). The district court was justified in making downward departure in the defendant's sentence due to sentence disparity, for his conviction on a charge of conspiracy to possess cocaine with intent to distribute. The sentences imposed upon similarly situated co-defendants were lower, there was no indication that the defendant was any more culpable than other defendants, and the defendant did not have any criminal history.

United States v. Parish, 308 F.3d 1025 (9th Cir. 2002). In a case involving possession of child pornography, the district court departed downward based on its finding that the fact that the defendant had not affirmatively downloaded pornographic files, but that the files had downloaded automatically into his temporary internet cache file, took his conduct outside of the heartland of the sentencing guideline for the conduct. The court also departed downward based on its determination that the defendant's stature, demeanor, and naivete, as well as the nature of his offense, rendered him susceptible to abuse by other inmates. The government appealed, and the Ninth Circuit affirmed the district court's departures noting that the district court had conducted an evidentiary hearing and was in a superior position to evaluate the evidence.

United States v. Basalo, 258 F.3d 945 (9th Cir. 2001). The district court erred in granting a four-level sentencing departure on the grounds that the defendant was prejudiced when the government withheld information that customs agents had received cash awards for preparing trial testimony because prosecutorial policy choices are not mitigating circumstances.

United States v. Caperna, 251 F.3d 827 (9th Cir. 2001). A downward departure based on sentence disparity among cooperating and non-cooperating defendants was not appropriate unless the codefendant was convicted of the same offense as the defendant.

United States v. Cruz-Guerrero, 194 F.3d 1029 (9th Cir. 1999). A district court may not depart downward from the guidelines on the basis of a defendant's substantial assistance to the government unless the government has moved for such a departure.

United States v. Pacheco-Osuna, 23 F.3d 269 (9th Cir. 1994). The district court erred in departing downward based on possible violations of the Fourth Amendment.

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[23] Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly added language to reflect the limitations on downward departures for crimes involving children or sexual offenses to grounds that are specifically listed in the guidelines. *See* USSG App. C, Amendment 649.

United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001). The district court reasonably departed by three levels based on the defendant's decision to call for help and direct the rescuers to the immigrants instead of fleeing and did not abuse its discretion for determining the extent of the departure based on the level of assistance provided by each defendant.

United States v. Rose, 20 F.3d 367 (9th Cir. 1994). The district court properly denied the defendant's request for downward departure based on sentencing disparity where the Commission intended to impose harsher penalties on defendants convicted under 18 U.S.C. § 1956(a)(1)(A).

United States v. Staufer, 38 F.3d 1103 (9th Cir. 1994). Sentencing entrapment is a proper basis for a downward departure.

United States v. Stevens, 197 F.3d 1263 (9th Cir. 1999). The determination of whether the defendant's conduct fell within the heartland of the guideline for possession of child pornography required a comparison of the defendant's conduct with that of other offenders.

United States v. Walker, 27 F.3d 417 (9th Cir. 1994). Post-arrest emotional trauma is not a proper ground for a downward departure.

Upward Departures

United States v. Cuddy, 147 F.3d 1111 (9th Cir. 1998). The district court properly departed upward by two levels based on the defendants' threats to the extortion victim's daughter. The defendants were convicted of interference with interstate commerce by threats of violence after kidnaping the daughter of a hotel owner and demanding ransom. The district court departed upward based on §2B3.2, comment. (n.8), which states that an upward departure may be warranted if the offense involved a threat to a family member of the victim. The victim of the extortion was the hotel owner and the defendants explicitly threatened his daughter's life.

United States v. Donaghe, 50 F.3d 608 (9th Cir. 1994). The defendant's reason for wanting a fake passport was not relevant to the offense of falsifying the application and could not be used as a departure factor.

United States v. Fontenot, 14 F.3d 1364 (9th Cir. 1994). The defendant's profit motive and more than minimal planning were proper grounds for departure.

United States v. G.L., 143 F.3d 1249 (9th Cir. 1998). Grouping of the defendant's auto theft offenses and destruction of the stolen vehicles are not proper grounds for an upward departure.

United States v. Hines, 26 F.3d 1469 (9th Cir. 1994). The district court did not err in departing upward three levels based on the defendant's extraordinarily dangerous mental state which posed an extraordinary danger to the community.

United States v. Ono, 997 F.2d 647 (9th Cir. 1993). The district court did not err in making a ten-level upward departure based on the potency of a synthetic drug not listed in the guidelines.

United States v. Ponce, 51 F.3d 820 (9th Cir. 1995). The district court did not err in departing upward two levels based on the size and sophistication of the defendants' drug trafficking operation.

United States v. Salcido-Corrales, 249 F.3d 1151 (9th Cir. 2001). Upward departure of two levels based on the defendant's role in coordinating the distribution of drugs and the defendant's use of his 18-year-old son in the drug dealing activities was warranted.

United States v. Scrivener, 189 F.3d 944 (9th Cir. 1999). The district court did not err in departing upward based on the targeting of the elderly in a telemarketing scheme.

United States v. Zamora, 37 F.3d 531 (9th Cir. 1994). The greater risk of violence associated with a fraudulent drug sale is not a proper ground for an upward departure.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). The defendant challenged the district court's upward departure made pursuant to §5K2.3 based on the psychological damage suffered by the family of a missing child when he falsely reported that he knew the whereabouts of the child's body and the identity of her assailant. The appellate court affirmed the departure, holding that the family was singled out by the defendant, and thus, along with the government, was a victim of his false statements. Furthermore, the evidence supported the finding that the child's mother suffered serious psychological injury and physical impairment. The appellate court also rejected the defendant's assertion that the departure would constitute impermissible double counting because the conduct was already punished under the Vulnerable Victim adjustment of §3A1.1. "There is no double counting if the extra punishment is attributable to different aspects of the defendant's criminal conduct." Section 5K2.3 focuses on the harm the defendant caused his victims, §3A1.1 punishes the defendant for his choice of a victim who is vulnerable to his offense.

§5K2.5 Property Damage or Loss (Policy Statement)

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994). The district court made an upward departure based on its finding that the defendant's conduct resulted in property damage or loss not taken into account by the guidelines, where the defendant caused a fatal automobile accident while he was intoxicated. The district court's calculation of $165,000 in damages included only $13,595.43 actually due to property damage and the remainder was based on consequential financial losses to the victim's widow. The appellate court reversed, reasoning that a departure under §5K2.5 may be based only on property damage or loss, and not other harms. In this case,

the circuit court noted, the amount of actual property damages attributable to the defendant's conduct was not sufficient to warrant an upward departure.

§5K2.7 Disruption of Governmental Function (Policy Statement)

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994). The district court upwardly departed based on a finding that the defendant's conduct resulted in a significant disruption of governmental function and significantly endangered the public welfare. The defendant caused an automobile accident resulting in the death of an officer of the Arizona Department of Public Safety. The circuit court reversed, holding that the evidence on which the departure was based, namely testimony from the victim's co-worker that the victim's death negatively affected other co-workers' concentration at work, was insufficient to support a finding that the department's functioning was significantly impaired or that the public welfare was significantly endangered. The fact that officers were stressed by the victim's death, the circuit court reasoned, did not demonstrate any actual disruption of police activity.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). The defendant was convicted of obstruction of justice and lying to the FBI and grand jury. The district court granted an upward departure pursuant to §5K2.8, which punishes extreme conduct which was unusually heinous, cruel, degrading, or brutal to the victim. The court of appeals held that the district court properly departed based on the defendant's deliberate false statements that he knew the whereabouts of the body of a missing eight-year-old girl and the identity of her assailant. The crimes for which the defendant was sentenced did not account for extreme cruelty or degradation with which the defendant acted.

United States v. Quintero, 21 F.3d 885 (9th Cir. 1994). Heinous treatment of the victim's body clearly fell within the scope of "extreme conduct."

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Cantu, 12 F.3d 1506 (9th Cir. 1993). Post-traumatic stress disorder can support a downward departure for diminished capacity where it reduces a defendant’s mental capacity, where the reduction is significant, where there is a nexus between the reduced capacity and the offense, and where §5K2.13 does not otherwise preclude the departure.

United States v. Davis, 264 F.3d 813 (9th Cir. 2001). Although the defendant suffered from an extraordinary mental disease, his substantial criminal history demonstrated a need for incarceration to protect the public, and, thus, precluded a departure under §5K2.13.

United States v. Dela Cruz, 358 F.3d 623 (9th Cir. 2004). A defendant convicted of making telephonic bomb threats was ineligible for a departure under §5K2.13 because the crime involved a serious threat of violence.

United States v. Smith, 330 F.3d 1209 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1096 (2004). The district court properly concluded that it lacked the discretion to depart pursuant to §5K2.13 because even though the defendant suffered from an extraordinary mental condition, he did not meet the other criteria of this section.

United States v. Walter, 256 F.3d 891 (9th Cir. 2001). The district court should have conducted an evidentiary hearing to determine whether the defendant had a diminished capacity where his crime did not invovle a "serious threat of violence."

§5K2.20 Aberrant Behavior[24]

United States v. Smith, 387 F.3d 826 (9th Cir. 2004). In the criminal proceedings for retaliating against a federal witness, the district court's finding that it could not depart downward on the basis of aberrant behavior because the defendant's case involved significant planning, went on for some period of time, and was not extraordinary was clearly erroneous. Although the defendant may have had time to plan the retaliatory act, that did not prove that the crime was, in fact, the product of significant planning. The crime only lasted for five or ten minutes. Many letters of support were submitted on behalf of defendant indicating that the defendant had lived an exemplary life prior to the crime, and that the crime represented a departure from her normal way of life.

United States v. Guerrero, 333 F.3d 1078 (9th Cir. 2003). The appellate court vacated and remanded the district court's sentence because the district court did not make the required findings to grant a downward departure based on §5K2.20 aberrant behavior. When applying §5K2.20, the sentencing court must conduct two separate and independent inquiries, both of which the defendant must satisfy before a departure can be granted. First, the court must determine whether the defendant's case is extraordinary and whether the defendant's conduct constituted aberrant behavior. Then, the offense conduct to be considered as aberrant behavior must have been committed without significant planning, be of limited duration, and represent a marked deviation by the defendant from an otherwise law-abiding life. In the instant case, the district court did not determine that the defendant's case was extraordinary or that her offense conduct had the characteristics concerning planning, duration, and deviation from an otherwise law-abiding life. Because the district court did not make the necessary findings, the sentence was vacated and the case remanded for resentencing.

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[24] Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended the guidelines by adding language prohibiting departures for aberrant behavior in crimes involving child crimes and sexual offenses. *See* USSG App. C, Amendment 649.

United States v. Lam, 20 F.3d 999 (9th Cir. 1994). The district court had the discretion to depart downward where there was evidence that the defendant's behavior was aberrant.

United States v. Leyva-Franco, 311 F.3d 1194 (9th Cir. 2002). The case was remanded for resentencing where the district court departed downward for aberrant conduct without making necessary findings.

United States v. Vieke, 348 F.3d 811 (9th Cir. 2003). Aberrant behavior departure pursuant to §5K2.20 was affirmed where the government failed to properly preserve its objection to the departure for appeal.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.2 Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

United States v. Hinojosa-Gonzalez, 142 F.3d 1122 (9th Cir.), *cert. denied*, 525 U.S. 1033 (1998). The district court erred by departing upward based on grounds of which the defendant did not receive adequate notice. Although the defendant knew the court might depart based on criminal history, the court ultimately departed on other grounds–a combination of prior unpunished criminal conduct and extraordinary drug quantity–which were not advanced until the sentencing hearing. The court of appeals emphasized that the defendant is entitled to notice of both the factual and legal grounds for upward departure.

§6A1.3 Resolution of Disputed Factors

United States v. Berry, 258 F.3d 971 (9th Cir. 2001). The district court did not abuse its discretion in relying on the hearsay statements of codefendants to enhance the defendant's sentence under §3B1.1(a). USSG §6A1.3(a) provides that such evidence can be considered "without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." The court has qualified the admissibility of hearsay at sentencing by requiring that such statements have "some minimal indicia of reliability."

United States v. Leyva-Franco, 311 F.3d 1194 (9th Cir. 2002). It is mandatory for the district court to resolve disputed factors, or state that disputed factors would not be considered, on the record.

United States v. Pinto, 48 F.3d 384 (9th Cir. 1995). The district court did not commit plain error when it considered evidence not included in either the stipulation of facts in defendant's plea agreement or the sentencing report but which came from co-defendant's trial.

Part B Plea Agreements

§6B1.1 Plea Agreement Procedure (Policy Statement)

United States v. Mukai, 26 F.3d 953 (9th Cir. 1994). The district court erred in departing downward based on its conclusion that "exceptional circumstances" justified disregarding the terms of the defendant's accepted Rule 11(e)(1)(C) plea agreement. Moreover, the government's 5K1.1 motion did not give the sentencing court discretion to depart downward "as much as it deemed appropriate without regard for the terms of the agreement." The dictates of Rule 11 trump the discretion afforded the district court under §5K1.1.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part A Introduction to Chapter Seven

United States v. Trenter, 201 F.3d 1262 (9th Cir. 2000). The district court did not err when it reinstated the defendant's term of supervised release under 18 U.S.C. § 3583(e) after he violated conditions of the release. Upon his conviction for aiding and abetting armed bank robbery, the defendant received a sentence which included five years of supervised release. After having served less than two months of that supervised release, the defendant violated several of its conditions when he fled the state. When the police arrested him two years later, the district court reinstated the original five-year term of supervised release, tolling the two years that the defendant was a fugitive. The defendant challenged this reinstatement, arguing that section 3583(e) does not grant judges the authority to reinstate an original term of supervised release after the defendant violates it. Section 3583(e) requires that courts consider the factors listed in 18 U.S.C. § 3553(a), which include "'the applicable guidelines and policy statements issued by the Sentencing Commission.'" *Id*. at 1263 (quoting 18 U.S.C. § 3553(a)(4)(B)). Based on a Commission policy statement stating that "when a court finds that a defendant has violated a condition of supervised release, 'it may continue the defendant on supervised release, with or without extending the term or modifying the conditions,'" the court affirmed the sentence, holding that district courts do have the authority under section 3583(e) to reinstate an original term of supervised release after the defendant has violated its conditions. *Id*. (quoting Ch. 7, Pt. A, intro. comment. 2(b)).

United States v. Steffen, 251 F.3d 1273 (9th Cir. 2001). The provisions of Chapter Seven are advisory policy statements but provide support for affirming a sentence that was imposed in accordance with one of their recommendations.

Part B Probation and Supervised Release Violations

§7B1.1 Classification of Violations (Policy Statement)

United States v. Jolibois, 294 F.3d 1110 (9th Cir. 2002). The Ninth Circuit held that the district court properly determined that defendant's simple possession of drugs was a Grade B supervised release violation under state law that allowed punishment exceeding a year, although it would have been a Grade C violation if punished under federal law. Although the offense was arguably both a Grade B violation (under state law) and a Grade C violation (under federal law), the Ninth Circuit noted that the guidelines themselves provide that if violation includes conduct that constituted more than one offense, the most serious grade applies.

§7B1.2 Reporting of Violations of Probation and Supervised Release (Policy Statement)

United States v. Morales-Alejo, 193 F.3d 1102 (9th Cir. 1999). The defendant pled guilty in 1995 to illegal reentry by an alien in violation of 8 U.S.C. § 1326(a), and received a two-year sentence followed by a one-year term of supervised release. The defendant's term of supervised release commenced on February 4, 1997. On October 21, 1997, when he was indicted on a charge of illegal reentry, the defendant was placed in pretrial detention. On February 18, 1998, the district court judge revoked the one-year supervised release term from the earlier offense and imposed a one-year imprisonment term to run consecutive to the sentence to be imposed on the new reentry conviction. The defendant appealed, arguing that his supervised release term expired on February 4, 1998, and deprived the district court of jurisdiction to revoke the term. The appellate court agreed with the defendant, holding that pretrial detention does not operate to toll a term of supervised release under 18 U.S.C. § 3624(e). The appellate court stated that pretrial detention does not fit the definition of "imprisoned in connection with a conviction" because a person in pretrial detention has not been convicted and might never be convicted.

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Garcia, 323 F.3d 1161 (9th Cir.), *cert. denied*, 124 S. Ct. 842 (2003). A district court need not provide a defendant with notice before imposing a sentence upon revocation of probation that falls outside the Chapter Seven policy statements, so long as the court considers the policy statements before imposing sentence. Chapter Seven sentencing ranges are advisory, rather than binding. So long as the court considers the policy statements, it has the authority to impose any term up to the statutory maximum available. *See also United States v. Donaghe*, 50 F.3d 608 (9th Cir. 1994) (The district court did not err in imposing a three-year term of supervised release upon resentencing the defendant after probation revocation.)

CHAPTER EIGHT: *Sentencing of Organizations*

Part C Fines

§8C3.3 Reduction of Fine Based on Inability to Pay

United States v. Eureka Laboratories, 103 F.3d 908 (9th Cir. 1996). The district court imposed a $1.5 million fine on the defendant organization. The defendant argued that the district court's determination of the restitution amount was contrary to §8C3.3 because the amount imposed had potentially devastating implications to the corporation. The circuit court upheld the fine, holding that §8C3.3 permits, but does not require, a court to reduce a fine upon a finding that the defendant organization is not able to pay it. The only time that a fine reduction is mandated by §8C3.3 is when the amount of the fine would impair the defendant's ability to pay restitution to the victim(s).

CONSTITUTIONAL CHALLENGES

Fifth Amendment—Double Jeopardy

United States v. Jernigan, 60 F.3d 562 (9th Cir. 1995). The defendant failed to appear at trial for counterfeiting and conspiracy charges, and the district court enhanced his sentence for "obstruction of justice" by two levels under §3C1.1. The defendant was separately indicted for failure to appear under 18 U.S.C. § 3146(a)(1), and sentenced to five months on the charge to run consecutively to his sentence for the counterfeit and conspiracy charges. The defendant argued that he was already punished for his failure to appear by the enhancement applied to his earlier sentence, and that the sentence violated double jeopardy. The circuit court, relying on *Witte v. United States*, 515 U.S. 389 (1995), *cert. denied*, 519 U.S. 1120 (1997), concluded that the subsequent imposition of a consecutive sentence for the defendant's failure-to-appear offense was not a double jeopardy violation where that offense had been taken into account for previous sentencing on the counterfeit and conspiracy charges. The circuit court stated "[b]ecause the defendant's punishment in the first case fell "within the range authorized by statute," his double jeopardy claim necessarily fails."

Sixth Amendment

United States v. Booker, 125 S. Ct 738 (2005). The rule announced in *Blakely v. Washington*, 124 S. Ct 2531 (2004), applies to the federal Sentencing Guidelines and therefore sentences imposed by judges using mandatory guidelines violate the Sixth Amendment right to a jury trial. In the remedial portion of the opinion, the Court held that the Sixth Amendment requirement that any fact, other than a prior conviction, which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt was

incompatible with Federal Sentencing Act, which called for promulgation of federal sentencing guidelines and made such guidelines mandatory, so the Act could not remain valid in its entirety. The Court then held that the provisions of the Act that made guidelines mandatory would be severed and the guidelines would henceforth be advisory. The remedial majority also severed the provision of the Act establishing standards of review on appeal and held that courts should review sentences for reasonableness.

Eighth Amendment

United States v. Barajas-Avalos, 377 F.3d 1040 (9th Cir. 2004). In determining whether a sentence constitutes cruel and unusual punishment, in violation of the Eighth Amendment, courts must accord substantial deference to legislative determinations of appropriate punishments. A sentence of 360 months did not constitute cruel and unusual punishment in violation of the Eighth Amendment. The sentence resulted from application of the sentencing guidelines, including enhancements for possession of firearms in connection with the offense and obstruction of justice, and was at low end of guideline range and was less than sentences imposed in two comparable cases.

United States v. Parker, 241 F.3d 1114 (9th Cir. 2001). A jury convicted the defendant under 18 U.S.C. §§ 2113(a) and (d), as well as 18 U.S.C. § 924(c), for conspiracy, bank robbery, and firearms violations. The district court imposed a sentence of 300 months for Section 924(c) weapons violations, which the defendant argued was cruel and unusual punishment. Citing cases where both the Supreme Court and the circuit had upheld more severe sentences, the court affirmed this portion of the sentence.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Arellano-Gallegos, 351 F.3d 966 (9th Cir. 2003). The defendant appealed his 51-month sentence imposed following his guilty plea to illegal re-entry after deportation. In his written plea agreement, the defendant agreed to waive his right to appeal the imposition of sentence. The magistrate judge who took the defendant's plea upon consent failed, however, to adhere to the requirements of Rule 11 regarding the waiver of appeal. The magistrate's findings and recommendations omitted any reference to the waiver of appeal, but the district court still accepted the defendant's plea of guilty. The waiver of appeal was never mentioned until the sentencing on April 25, 2001, when, in passing, the district court noted that "the record shows that [the defendant] waived his right to appeal." The Ninth Circuit concluded that, given these facts, the failure to comply with Rule 11 constituted plain error. Neither the magistrate judge nor the district court ascertained whether the defendant's waiver of appeal was knowing and voluntary "before" the acceptance of the plea, as Rule 11 requires. The court thus held that because there was a "wholesale failure" to comply with Rule 11 or otherwise ensure that

the defendant understood the consequences of waiving his right to appeal the sentence, enforcement of the waiver would seriously affect the fairness, integrity and public reputation of plea proceedings. Therefore, the court of appeals remanded for resentencing.

United States v. Cervantes-Valencia, 322 F.3d 1060 (9th Cir. 2003). The defendant entered into a binding plea agreement that provided for a 30-month sentence. At sentencing, the defendant advised the Court that he had been in custody for ten months for a parole violation stemming from the same conduct as his federal conviction: illegal entry into the United States. The district court accepted the plea agreement, but imposed a 20-month sentence to credit the defendant for the ten months spent in state custody. On appeal, the government argued that the district court was required to either impose the 30-month sentence specified in the plea agreement or allow the parties to void the agreement. The Ninth Circuit agreed, noting that the district court did not apply any provision of the guidelines or any default rule requiring the court to credit the defendant 10 months against the 30-month term.

United States v. Mukai, 26 F.3d 953 (9th Cir. 1994). The government's motion for downward departure based on substantial assistance did not give district court authority to depart downward as much as it deemed appropriate without regard for terms of the binding plea agreement which it had already accepted.

United States v. Reyes, 313 F.3d 1152 (9th Cir. 2002). The defendants entered binding plea agreements under former Rule 11(e)(1)(C), which required their full cooperation with the government, and pursuant to which the government agreed to move under §5K1.1 for a departure to 120 and 150 months respectively. Neither defendant ever cooperated. Instead, first the defendants, then the government joined by the defendants, moved to void the plea agreements and set aside the pleas. The district court refused, finding that the portions of the plea agreements dealing with cooperation and §5K1.1 motions were severable. At sentencing, the district court sentenced the defendants pursuant to the guidelines without the benefit of the §5K1.1 motions. The defendants appealed. The Ninth Circuit held that the district court had erred in sentencing the defendants to terms higher than those stipulated in the binding plea agreements. The district court's only options were to accept the plea agreements and sentence as provided therein, or to reject the agreements and allow the defendants to withdraw their pleas. In light of the district court's statements that it believed the defendants had attempted to manipulate the system, the Ninth Circuit remanded the case to a different district court judge.

United States v. Villalobos, 333 F.3d 1070 (9th Cir. 2003). The defendant pled guilty to a drug offense and stipulated to a range of drug quantity. The defendant appealed, contending that the plea colloquy under Fed. R. Crim. P. 11 was inadequate because it failed to advise him that the government was required to prove drug quantity beyond a reasonable doubt to expose defendant to a sentence beyond the statutory maximum. The government conceded that the colloquy failed to advise defendant but argued that the error was harmless because the defendant understood the significance of drug quantity and stipulated to quantity. The appellate court held that the district court violated Rule 11 by not informing defendant of the nature of the charges

against him, the error was not harmless, and defendant was thus entitled to enter a new plea. Drug quantity was a critical element of defendant's offense and defendant's understanding of the significance of such quantity did not change the fact that he was unaware that the government had to prove drug quantity beyond a reasonable doubt. Further, defendant's stipulation concerning quantity did not establish that defendant would have pled guilty in any event, and there was very little actual evidence to as to the quantity involved.

Rule 35

United States v. Doe, 351 F.3d 929 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2894 (2004). The defendant pled guilty to conspiracy to import cocaine and was sentenced to 210 months in prison. The district court later corrected that sentence and reduced it pursuant to a government motion under Fed. R. Crim. P. 35(b). The Government filed a second Rule 35(b) motion which the court denied. The defendant appealed, arguing that the judge committed an error of law when it denied the motion upon consideration of factors unrelated to his substantial assistance to the Government. In denying the motion, the district court weighed several factors against the defendant's substantial assistance, including the nature of the cocaine importation conspiracy to which he pled guilty; the extent and duration of his participation in the cartel; the massive amount of cocaine he was importing; and the sentencing reductions the court had already awarded. The Court of Appeals held that the district court's consideration of these factors was proper under 18 U.S.C. §§ 3553 and 3582, and concluded that nothing in the language of Rule 35(b) prohibits the district court from considering these factors in denying the government's motion to reduce Doe's sentence.

United States v. Portin, 20 F.3d 1028 (9th Cir. 1994). The district court exceeded its authority under Fed. R. Crim. P. 35 when it increased the defendants' fines at resentencing. The defendants' original sentencing was vacated because of Fed. R. Crim. P. 11(e) violations. On remand, the sentencing court not only corrected the terms of the defendants' sentences to conform to their plea agreements, but also increased the fines originally imposed. Fed. R. Crim. P. 35 authorizes only the correction of sentences that were imposed illegally; thus the district court is not permitted to reconsider or reopen issues which were properly resolved at the initial sentencing.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924

United States v. Harris, 154 F.3d 1082 (9th Cir. 1998). After being found guilty of multiple counts of armed robbery and use of a firearm during and in relation to a crime of violence, the defendants were sentenced to the statutory mandatory minimums 1,141 months (95 years) and 597 months (49.75 years) respectively. The defendants argued that these sentences constitute cruel and unusual punishment in violation of the Eighth Amendment. The court of

appeals rejected the defendants' contention that the sentences violated the Eighth Amendment because they are disproportionate to their crimes. Armed robberies are extremely dangerous crimes. Moreover, Congress mandated the sentences, and a sentence which is within the limits set by a valid statute may not be overturned as cruel and unusual. The state has a legitimate interest in treating repeat offenders more severely than first offenders. Thus, the court of appeals stated it could not find the defendants' sentences grossly disproportionate to their crimes.

United States v. Phillips, 149 F.3d 1026 (9th Cir. 1998). Whether a prior conviction may be used for purposes of sentence enhancement under Armed Career Criminal Act (ACCA) is a question of law reviewed de novo on appeal. Offenses are separate predicate offenses "committed on occasions different from one another" for purposes of sentence enhancement under Armed Career Criminal Act (ACCA) if they are temporally distinct, even if committed within hours of each other, similar in nature, and consolidated for trial or sentencing.

21 U.S.C. § 841

United States v. Rodriguez-Sanchez, 23 F.3d 1488 (9th Cir. 1994). The district court imposed a ten-year mandatory statutory sentence for possession of methamphetamine with intent to distribute based on the entire amount of methamphetamine found in the defendant's possession at the time of his arrest. The defendant argued that he only intended to distribute a portion of the amount he possessed and that his sentence should have been based only on this amount. The circuit court agreed. Section 841(a) of Title 21 criminalizes distribution, not mere possession. Relying on the principle that drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute, the circuit court held that the sentence for possession with intent to distribute a narcotic substance, under the statutory penalty provisions of 21 U.S.C. § 841(b)(1)(A), should also be based only on the amount intended for distribution. Accordingly, the defendant's sentence was vacated and remanded for a factual determination of the amount of methamphetamine the defendant intended to distribute.

POST-*BOOKER* (*UNITED STATES V. BOOKER*, 125 S. Ct. 738 (2005))

United States v. Reynolds, 2005 WL 281475 (9th Cir. 2005). Because the defendant's 30-month sentence was imposed under the system of mandatory guidelines, the enhancement of his sentence based on facts found only by the judge violated the Sixth Amendment. Therefore, the court vacated the defendant's sentence and remanded the case for resentencing in a manner consistent with *Booker*.

United States v. Stewart, 2005 WL 281418 (9th Cir. 2005). The district court's upward adjustments pursuant to §§4A1.3 and 5K2.14 were based on findings not made by the jury and, thus, violate the the Sixth Amendment. Therefore, the court vacated the defendant's sentence and remanded the case for resentencing in a manner consistent with *Booker.* Because under *Booker* the district court may still consider the correct guideline range before imposing a sentence on remand, the court noted that the district court misapplied §5K2.14. This enhancement should not

be based on a defendant's criminal history or likelihood of recidivism; rather, the district court may increase the sentence "to reflect the nature and circumstances of the offense." §5K2.14 (emphasis added). Moreover, because drunk driving will always involve endangering the public to some degree, an increase is only appropriate in exceptional circumstances.

United States v. Ruiz-Alonso, 2005 WL 326839 (9th Cir. 2005). The government appealed the district court's decision at sentencing to depart downward by four levels for cultural assimilation and other combinations of factors suggested by the defendant. Because the court could not say that the district judge would have imposed the same sentence in the absence of mandatory guidelines and de novo review of downward departures, the court remanded the case for resentencing in a manner consistent with *Booker.*

United States v. Ameline, 2005 WL 350811 (9th Cir. 2005). In light of the Supreme Court's decision in *Booker*, the Ninth Circuit granted the defendant's petition for rehearing to reconsider the decision in *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004).[25] Upon rehearing and applying *Booker* to the present case, the court concluded that (1) the Court's holding in *Booker* applies to all criminal cases pending on direct appeal at the time it was rendered; (2) because the defendant did not raise a Sixth Amendment argument at the time of sentencing, the court reviews for plain error; (3) the defendant 's sentence violated the Sixth Amendment and constituted plain error; and (4) the error seriously affected the fairness of the defendant 's proceedings. Accordingly, the court vacated the defendant's sentence and remanded for resentencing. The court also stated *Booker* did not relieve the district court of its obligation to determine the sentencing guidelines range for the defendant's offense of conviction, and the court must still comply with the requirements of Federal Rule of Criminal Procedure 32 and the basic procedural rules adopted to ensure fairness and integrity in the sentencing process. Although the final sentencing guidelines range is nonbinding under *Booker*, there are serious sentencing ramifications to the district court's factual findings. Thus, the court must resolve any material factual dispute over guideline factors before it exercises its sentencing discretion and imposes a sentence in conformity with *Booker*.

[25] In the original opinion, the court held that, because the defendant's sentence under the Sentencing Guidelines was based on facts found by the district judge by a preponderance of the evidence, his sentence violated the Sixth Amendment as construed by the Supreme Court in *Blakely*. The court vacated the defendant's sentence and remanded for resentencing with directions that, if necessary, a jury determine the amount of drugs attributable to the defendant and whether he possessed a weapon in connection with his conviction, two factors that could enhance his sentence under the Sentencing Guidelines.